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**Local One, Amalgamated Lithographers of America
(Metropolitan Lithographers Assn.) and Richard D'Amico.** Case 22–CB–8101

October 1, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On November 18, 1999, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order, as modified.¹

1. Contrary to the judge, we find that the contractual language itself created an exclusive hiring hall. The bargaining agreements which the Respondent-Union had with the members of the Metropolitan Lithographers Association, Inc., state in relevant part:

5(a) *Vacancies*—Each Employer shall advise the Union office and the Shop Delegate [shop steward] when in need of employees. . . . Any person sent by the Union office for a job shall present his work card to the Shop Delegate after being interviewed by the Employer and before starting work.

The language states that an employer “shall” notify the Union of job vacancies, which, absent any mention of another means for filling jobs, indicates that employers are required to use the hiring hall to obtain employees. The language also states that anyone sent by the union office shall present his work card to the shop delegate after being interviewed, which indicates that employers are required to hire the referrals unless the referrals are for some reason unacceptable. Thus, when reasonably read, the language means that employers must go to the Respondent-Union for referrals, the Union will make referrals, and the employers will hire the referred persons if they are acceptable. Although not every aspect of an exclusive hiring hall is spelled out by the contractual language, the key elements are. Accordingly, we find that the contractual language is sufficient to establish an exclusive hiring hall.

In addition, the Union's internal rules state:

¹ We will modify the judge's recommended Order in accordance with *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

No member shall . . . solicit employment for himself . . . in any shop within the jurisdiction of this Local . . . nor obtain employment himself without the consent of the proper Local officer.

Prohibiting members from seeking employment other than through the Union supports our conclusion that the agreements create an exclusive hiring hall. Although we agree with the judge's finding that the parties' practice would establish an exclusive hiring hall, we need not rely on the parties' practice because we are finding that the bargaining agreements establish an exclusive hiring hall. Nonetheless, we find that the parties' practice confirms our decision to find an exclusive hiring hall.

2. Because the parties have an exclusive hiring hall, it is unnecessary to consider the consequences of a non-exclusive hiring hall. Thus, the judge's discussion of *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989), her finding that a duty of fair representation attaches to a nonexclusive hiring hall, and her discussion about the effects of a nonexclusive hiring hall within the context of specific incidents are unnecessary to resolution of this case. Accordingly, we do not rely on her discussion of these matters.

3. The judge found specific violations of the Act in 22 numbered incidents and in the unnumbered MacNaughton Incident. The judge's findings of these violations are, with two exceptions, supported by the facts and the judge's analyses.²

First, in Incident 49, the judge found that requests for help from employer Atwater on May 30 and June 2, 1995, involved the same job. A review of the request-for-help exhibits reveals, however, that the May 30 request involved a 40-inch Miehle press and the June 2 request involved a 60-inch Miehle press. Thus, the requests are for different presses and apparently for different jobs. The record further shows that the June 2 request had a starting date of June 5, and that James Vacca, with a later out-of-work date than D'Amico, started working for Atwater on that date. We find that Vacca was referred to and hired for the second job—the June 2 request for a second pressman on a 60-inch Miehle press.³ Although we do not agree with the judge's finding that the two Atwater requests for hire were for the same job, we agree with the judge's analysis of this incident, as modified above, and find that the Respondent-Union violated the Act in Incident 49 by referring Vacca to the second job ahead of D'Amico.

² No exceptions were filed with respect to the incidents in which the judge found no violations.

³ The judge makes no findings about who, if anyone, was referred in response to the May 30 request.

Second, we reverse the judge's finding of a violation in Incident 58.⁴ That incident involved a request for help from employer Barton on July 5, 1995. The request for help does not specify the kind of press involved and therefore could have been for a web press. Although D'Amico's out-of-work card stated he could work as a second pressman on all presses, D'Amico admitted he could not work on web presses. A union may defend against an allegation of improperly referring out of order by establishing a justification for referring someone out of order. *Plumbers Local 375 (H. C. Price Construction)*, 330 NLRB No. 55 (1999); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), enf'd. 701 F.2d 504 (5th Cir. 1983). When, as here, the request for help fails to specify the press involved, the Respondent-Union would be justified in not calling D'Amico because the request could be for a web press, a job D'Amico cannot perform. Accordingly, we reverse the judge and find that the Respondent-Union did not violate the Act in Incident 58.⁵

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated the Act in the MacNaughton Incident. MacNaughton asked the Union to refer D'Amico, a pressman, as an operator on a large Harris press, and the Union refused. As our dissenting colleague asserts, the evidence regarding Purdy's referral to employer Pace is inconclusive. Nonetheless, we agree with the judge that the other evidence shows that the Respondent was not justified in failing to refer D'Amico. MacNaughton had for years had difficulty finding pressmen qualified to operate large Harris presses and had on prior occasions put pressmen in operators' positions to retain them as potential pressmen on large Harris presses. MacNaughton had employed D'Amico earlier as a pressman on large Harris presses and specifically asked for D'Amico by name. Here, the Union argues that it was justified in refusing to refer D'Amico because it had difficulty placing operators and would not therefore refer pressmen to work as operators. Even if that would be a justification in general, it is not on the spe-

cific facts here. There is no claim or evidence that any operator on the employment list had experience on large Harris presses or that the employment office tried to find such an employee on the operator list. Further, as far as the record shows, the Respondent-Union had refused the employers' requests for named employees only where other employees were available for referral to the vacant jobs, and these jobs were then filled by other employees referred by the employment office. Thus, referring D'Amico to MacNaughton would not have taken work away from an operator.

We therefore agree with the judge that the Union was not justified in refusing to refer D'Amico to the MacNaughton operator position.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local One, Amalgamated Lithographers of America, Newark, New Jersey, its officers, agents, and representatives, shall take the action set forth in the Order except as modified below.

Substitute the following for paragraph 2(e).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all employment transaction lists, employment checkoff lists, requests for help, employment cards, work slips, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner."

Dated, Washington, D.C. October 1, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

Contrary to the majority, I would reverse the judge and find that the Union did not violate the Act in the MacNaughton Incident. Prior to becoming employment director, D'Amico had worked for MacNaughton for 20 years, mostly on large (77- and 78-inch) Harris manual sheet-feed presses. In an attempt to help D'Amico (and probably to get an experienced backup person on the

⁴ Member Truesdale agrees with the judge's analysis of this incident and would find that the Union violated the Act by failing at least to call D'Amico for the job. The Union's failure to call D'Amico deviated from the Union's hiring hall practice to contact the person with the oldest out-of-work date whose employment card stated that he was qualified to operate the type of press involved in the job. D'Amico's employment card stated that he was qualified as a second pressman on all presses, and D'Amico had been out of work longer than the person the Union referred to the job.

⁵ Our finding is consistent with the judge's dismissal of Incidents 28, 30, 32, 61, and 63, in which persons with later out-of-work dates than D'Amico's were referred to jobs and the record shows a web press was involved or fails to show what press was involved.

large Harris presses), MacNaughton asked to have D'Amico referred as an operator and later as an operator with pressman pay. The Respondent-Union refused to refer D'Amico, a pressman, to a job as an operator.¹ The Respondent-Union produced un rebutted testimony that it was difficult to place operators and that it would not, therefore, refer anyone but an operator to an operator's job. This would be a reasonable justification for not referring a pressman, such as D'Amico, to an operator's job, unless the evidence refutes it.

The judge relied on three separate factors to refute the Respondent-Union's asserted justification. First, the judge relied on a referral of employee Purdy to employer Pace as evidence that the Respondent-Union did not consistently apply its policy of not referring anyone but an operator to an operator's position. Initially, it is unclear from the request-for-help form that an operator's position was involved.² Further, the record does not conclusively establish whether Purdy was an operator or a pressman. Thus, the record is insufficient to conclusively support a finding that the Purdy referral was inconsistent with the Respondent-Union's treatment of D'Amico in the MacNaughton Incident.

Second, the judge relied on other occasions when the employment office referred Ruggiero, who was requested by name because of his skills on unusual presses, and when the employment office referred others requested by name. Third, the judge relied on requests for referrals that involved requests for certain specialties. There is no evidence that these referrals were out of classification or to jobs other than in the referred employees' classifications. Thus, these referrals are insufficient to refute the Respondent-Union's justification for not referring D'Amico to MacNaughton.

Accordingly, I would find that the Respondent-Union was justified in not referring pressman D'Amico to an operator's job at MacNaughton and that therefore the Respondent-Union did not violate the Act in the MacNaughton Incident.

Dated, Washington, D.C. October 1, 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Patrick Daly, Esq., for the General Counsel.

¹ MacNaughton did not seek anyone else to fill the job.

² A large circle was drawn around most of the letters in "operator" but also a few of the letters of "pressman."

Thomas M. Kennedy, Esq. and *Ira Cure, Esq.*, both of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on October 21 and 22, 1997, and February 2, 3, 4, and 10, 1998, pursuant to a charge filed on August 3, 1995, against Respondent Local One, Amalgamated Lithographers of America (the Union) by Richard D'Amico, an individual; and a complaint issued on May 9, 1997. The complaint alleges that since about March 13, 1995, the Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by failing and refusing to refer D'Amico for employment contrary to the Union's established hiring hall rules and procedures, because D'Amico engaged in protected activities, and for reasons other than the failure to tender periodic dues and the initiation fees uniformly required for membership in the Union.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the brief filed by counsel for the General Counsel (the General Counsel) and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Union is a labor organization which, at all material times, has maintained a collective-bargaining agreement with the Metropolitan Lithographers Association (the MLA). The MLA has at all material times been an organization composed of employers engaged in the operation of lithographic plants in New York, Connecticut, New Jersey, and Pennsylvania; and exists for the purpose, inter alia, of representing its employer members in negotiating and administering a collective-bargaining agreement with the Union. During the year preceding the issuance of the complaint, employer-members of the MLA caused to be purchased, transferred, and delivered to their New Jersey facilities goods and materials valued in excess of \$50,000 which were transported to customers in interstate commerce directly from States other than New Jersey. The complaint alleges that the Union unlawfully failed and refused to refer D'Amico to employer-members of the MLA. I find that, as the Union admits, the employer-members of the MLA collectively have at all material times been engaged in commerce within the meaning of the Act. I further find that assertion of jurisdiction in this case will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Relevant Provisions of the Applicable Bargaining Agreements and of the Union's Internal Rules

Between July 1994 and June 1997, a period which includes the time span during which the alleged unfair labor practices occurred, the Union was party to a bargaining agreement with the MLA, and bargaining agreements with certain lithographic employers who were not MLA members, each of which in-

cluded a clause recognizing the Union as the exclusive bargaining representative of all of the contracting employers' lithographic employees within the Union's territorial jurisdiction. Each of these bargaining agreements contained the following provisions:

HIRING HELP

5(a) Vacancies—Each Employer shall advise the Union office and the Shop Delegate when in need of employees. When the Employer thereafter fails to notify the Union office promptly when additional help is no longer needed and, as a consequence, an applicant reports to the Employer's premises and is not hired because of lack of work, the applicant shall be entitled to two hours' pay at the scale for the position for which he has applied. Any person sent by the Union office for a job shall present his work card to the Shop Delegate after being interviewed by the Employer and before starting work.

All these contracts also contained union-shop clauses. The employers who are parties to these contracts are referred to here as "covered employers."

The Union's internal rules provide, *inter alia*, "No member shall . . . solicit employment for himself . . . in any shop within the jurisdiction of this Local . . . nor obtain employment himself without the consent of the proper Local officer". Also, "Any unemployed member who shall refuse to accept employment obtained for him by the Local office shall be placed at the bottom of the out-of-work list and shall be ineligible for Local unemployment benefits; repeated refusals shall subject the member to such other penalties as are provided in these By-laws. . . . Every member shall notify the Local office within twenty-four (24) hours of any change in his employment status. . . . Any member who is referred to a new position by the Local office shall be entitled to receive full information from the office pertaining to such position. . . . No member shall do any work outside of his regular classification except with the prior consent of the Local office."

B. Operation of the Employment Office

1. Background

At all times relevant here, the covered employers obtained employees by means of referrals from an operation referred to in the record as the employment office. The employment office is ordinarily run by an individual whose title is employment director.¹ During an undisclosed period beginning prior to 1978 and ending in 1985, the employment director was one Louis Bernstein. During at least the latter part of Bernstein's tenure as employment director, he was assisted (largely in clerical matters) by two employees on the Union's payroll—bookkeeper Catalina Williams and Sylvia Volpe, who was the secretary to the employment director, at least when Bernstein's successor occupied that job.² In addition, from time to time

over a 20-year period while Bernstein or his successor was employment director, Volpe would perform some or all of the employment director's duties. In 1985, when Bernstein resigned his job as employment director, then Union President Hanson requested the Charging Party, Richard E. D'Amico,³ to fill the employment director's job, which D'Amico accepted. D'Amico had joined the Union in 1964. As set forth in greater detail, *infra*, before becoming employment director he had worked in various capacities on the presses. The procedures which he followed as employment director were taught to him by Bernstein, Williams, and Volpe. Williams credibly testified that so far as she knew, D'Amico ran the employment office the same way that Bernstein had, except that the installation of a computer made recordkeeping easier.⁴

As discussed in greater detail, *infra*, in 1992 D'Amico resigned as employment director in order to run for union vice president, an office to which he was elected effective in January 1993. His successor as employment director was Anthony Rotoli, when D'Amico trained to operate the employment office about the same way that D'Amico had been operating it.

In January 1995, Rotoli was succeeded as employment director by Joseph Composto, whom Williams taught how to run the employment office. Composto left this job for health reasons about early March 1996. Williams was in charge of the employment office between the time Composto stopped operating that office and the time its operation was taken over by Anthony Scotto, whom Williams trained to operate the employment office. Scotto became employment director on July 1, 1996, but Williams credibly testified that she was in charge of the employment office for at least 5 months during the change-over. The May 1997 complaint alleges that the Union has unlawfully failed and refused to refer D'Amico since about March 13, 1995. However, since June 1996, D'Amico has been disabled and unable to work.

2. The mechanics of the employment office

At all material times, an employee who seeks work through the employment office initiates the process by depositing with the employment office a filled-out form (to which carbon copies are attached) referred to in the record as an employment card (the term used in this decision) or as an out-of-work card. The entries on this form are inserted by the employment director. The employment cards used during the relevant period all call for (*inter alia*) the employee's name, address, and telephone number, the employee's "branch" (a term related to the job which the employee is qualified for and wants; see *infra*), and the date when he came to the employment office and asked it to fill out a new employment card—a date which the card describes as the "Reporting Date," which is referred to as the "out-of-work" date, and which is usually (but not always) the

My finding that Williams was employed by the Union is based on her testimony and on the pleadings as explained by the Union's counsel.

³ Not to be confused with his son, Richard A. D'Amico, who is also in the lithographers' trade.

⁴ Williams had occasionally filled in for Bernstein during his absence. Also, she occasionally worked with D'Amico when he was employment director.

¹ The General Counsel's disputed contention that the employment director is an agent of the Union is discussed below sec. II,M,1.

² Volpe did not testify. My finding that she was employed by the Union is based on the uncontradicted testimony of Richard E. D'Amico, who worked with her when he was employment director.

date on which he left his most recent employer.⁵ At the bottom of the card, and separated from the rest of the card by a perforated line for easy detachment, is a slip of paper which is captioned, "Present this employment card to shop delegate" and directs the shop delegate to "report results of interview to the employment office immediately." This slip of paper, which is referred to as a work slip, calls for, among other things, the employee's name and address, his "branch," the name and address of the shop, and the name of the person to whom the referred employee is supposed to report. In early 1995, when the employment office's stock of the forms then being used began to run out, Composto ordered from the printer a stock of new-style forms which were larger and stiffer than the old ones, although identical to them in the respects previously mentioned. The new-style forms were delivered to the employment office about late March 1995.

At all times material here, the employment director would divide the employment cards in accordance with their respective "branches." The "branch" here involved is the pressroom, and the subsequent description of the employment-office operations will be put mostly in terms of that "branch." The pressroom "branch" is in turn divided into three "lists"—pressmen, operators, and tenders—with the appropriate category ordinarily being entered on the form in the "branch" blank. The pressmen have journeymen books, which they have usually obtained after working as tenders and then, operators. Accordingly, at least as to any particular press, the pressmen are ordinarily capable of performing all of the functions performed by the operators, but the operators are not ordinarily capable of performing all of the functions performed by the pressmen. After dividing the employment cards between the respective "lists," the employment director will arrange them in accordance with their "out-of-work" dates, the top card being the card bearing the earliest such date.

As to employees in the pressroom, the bargaining agreements attach separate (although not necessarily different) minimum wage scales to the crews on each of a number of different kinds of presses. The job titles "tender" and/or "operator" are listed under most (although not all) kinds of presses.⁶ Under some kinds of presses, only 1 "pressman" is listed. Under other kinds of presses, "1st pressman," "2nd pressman," and (sometimes) "3rd pressman" are listed, with the minimum wage for the "1st pressman" slightly exceeding the minimum wage for the "2nd pressman."⁷ All pressmen carry the same kind of

journeyman book, but some pressmen will accept only first pressmen's jobs, some will accept only second pressmen's jobs, some will accept either, and some will accept first pressmen's jobs on some but not all presses. Much of this information is noted on the upper portion of the employees' employment card, frequently in the blank calling for the employee's "branch." First pressmen and second pressmen perform about the same functions, but the second pressman works under the direction of the first pressman, who is charged with most of the responsibility for the press.⁸

An employer who wishes to fill a vacancy telephones the employment director and tells him of the employer's needs. The employment director then fills out a "request-for-help" (RFH) form which calls for, among other things, whether the requested classification is a pressman, "operator or feeder," or a tender; the shift; and whether the job is temporary or permanent. If the request is for a pressman, the form inquires whether the press is a "1 2 or 4 color press," with a specification as to size; or a web or Harris press.⁹ If the request is for an operator or feeder, the RFH form calls for a specification as to "1 2 or 4 color press" and the size. After filling out this RFH form, the employment director is supposed to determine which employee who is qualified for the job has the earliest out-of-work date on what is referred to in the transcript as the employment list (a list of unemployed employees),¹⁰ and to give him an opportunity to interview the employer for the job. The basis on which the determination of job qualification is made is discussed infra section II.E. When the employment director decides which employee is entitled to the referral, the director telephones him and tells him about the job. At least ordinarily, the employment director notes on the employee's employment card, in an area above the perforated line which separates the work slip from the rest of the card, some details about what job the employee was contacted about, whether he wanted to be referred to it, and the reasons he gave for any desire not to be referred, sometimes including a disclaimer of ability to operate the press in question. If the employee wants the job, he ordinarily goes to the employment office, which fills out the work slip on the bottom of the employee's employment card, detaches the work slip from the top copy of the employment card, and gives the employee the top copy of the work slip, retaining for the Union's records the carbon copies of the work slip. Then, the employee proceeds to the employer's shop, where the employee gives the work slip to the union "delegate" (shop steward) at the shop and interviews the employer, who is free to reject him and

⁵ The employee is supposed to notify the employment office immediately on being separated from an employer. If the employee delays in such notification, his "Reporting Date" is correspondingly later. However, he retains his original "Reporting Date" until he has actually worked for 15 days.

⁶ Under some kinds of presses are listed the titles "1st operator . . . 2nd operator" and/or "1st tender . . . 2nd tender." Although the minimum rate for operators is about 70 percent more than the minimum rate for tenders, the minimum wage differentials between first and second operators, and between first and second tenders, are insubstantial. However, according to union counsel, first pressmen, at least, are sometimes paid significantly more than the contractual minimum.

⁷ During the year ending July 1, 1996, as to the presses calling for two pressmen, the minimum hourly wage for a first pressman varied

between \$22.455 and \$24.549, and for a second pressman between \$21.884 and \$23.527. See also fn. 6, above.

⁸ No contention is made that the first pressman is a statutory supervisor.

⁹ If a pressman is requested on a web or Harris press, the form also calls for a specification as to whether the size is "17 x 22" or "22 x 29". It is unclear from the form whether these sizes refer exclusively to a web or a Harris press respectively, or whether either kind of press can be of either size.

¹⁰ The document which compiles these data is captioned "Employment Checkoff List". It has nothing to do with the checkoff of union dues.

sometimes does.¹¹ Whether or not the employee is hired, he and the delegate are supposed to report the results of this interview to the employment office.

If the employer refuses to hire the referred employee, or if (inferentially) if the employee refuses the job after being interviewed, an employment card with respect to that employee, and at least ordinarily with the same out-of-work date as the predecessor card,¹² will be returned to the file containing the employment cards of the employees who want jobs. At least ordinarily, the employment card returned to the file for such reasons will contain a notation by the employment director as to the reasons for the employer's or the employee's rejection, sometimes including alleged insufficient skills on the press in question. When an employee comes to the employment office and states that his employment has been terminated, the employment office will put him on a list of employees qualified for unemployment benefits (inferentially, from sources connected with the bargaining relationship) and at least ordinarily, will prepare a new employment card for him, at least sometimes containing information on the old card which is relevant as to which job he will be contacted about thereafter. The new employment card will set forth either a new out-of-work ("Reporting") date, or the out-of-work date on the prior card with an explanation of why it has not been changed (usually, that the employee had not worked enough days since acquiring his old out-of-work date; see fn. 5, *supra*).

C. Events before D'Amico's Loss of Election for Union Office

D'Amico has been a member of the Union since 1964. When he first became a member, he worked as a tender. In 1965, he obtained a job through the employment office as a tender with MLA member MacNaughton Einson Graphics ("MacNaughton"), where he continued to work until 1985. After working there for 5 or 6 years as a tender, D'Amico became an apprentice operator. After working for 4 years as an apprentice operator, he became a journeyman operator. After working for 4 or 5 years as a journeyman operator, he became an apprentice pressman. After working for 4 years as an apprentice pressman, he became a journeyman pressman in 1976 or 1978. At all material times thereafter, he has held a journeyman pressman's book. In 1985, when he stopped working in the trade, he was a second pressman for MacNaughton on a 77-inch Harris press, which is fully manual and prints billboards. D'Amico never worked as a first pressman.

¹¹ If physically reporting to the employment office would require the employee to expend a good deal of time or money, or if the referral is made on an emergency basis, the employee may report directly to the employer, without picking up a work slip at the employment office. Under such circumstances, the employment director mails the employee's work slip to the employee to give to the delegate.

¹² As previously noted (above at sec. II,A), a member who refuses to accept employment obtained for him "by the Local office" is to be placed at the bottom of the employment list. I am unsure whether the refusal in question consists of a refusal to accept a referral (as Williams' testimony implies) or a refusal to accept the employer's offer of a job after the employee has obtained a work slip with respect to that employer. However, this matter is immaterial to the issues here.

In 1985, D'Amico was appointed by the Union's then president, Hanson, to serve as employment director. D'Amico continued to serve as employment director until the end of 1992, when he began a two-year term as the Union's vice president, a paid elective office. While thus serving as vice president, he handled a grievance on behalf of member Jimmy Seaman, who had been discharged at least allegedly for refusing to perform, at tender's pay, the work of an operator on a particular press. In September 1994, just before then union executive vice president Pat LoPresti and director of organizing Joseph Calderone were nominated to run for union president and re-election as director of organizing respectively, Seaman came to D'Amico's office and, in LoPresti's and Calderone's presence, told D'Amico about the grievance. Inferentially after Seaman had left D'Amico's office, D'Amico asked LoPresti and Calderone whether they wanted to help out with the grievance; they did not respond and took no action. D'Amico initially believed Seaman's grievance to be meritorious, but abandoned it after then union president James Brady showed him a signed contract permitting Seaman's employer to operate that press with a tender if the press had a particular attachment and D'Amico ascertained the presence of that attachment. During the union meeting where LoPresti and other candidates (perhaps including Joseph Composto, an uncontested nominee for photographers' representative on the council board) were being nominated, Seaman carried in front of the union meeting hall in Manhattan a flyer advocating LoPresti's election as union president. When D'Amico found out that Seaman was complaining to employees in a number of Manhattan lithographic shops about D'Amico's having dropped Seaman's grievance, D'Amico telephoned him and asked what he was doing. Seaman said that D'Amico had sold him down the river, and that when LoPresti was elected president he was going to reopen Seaman's case. Thereafter, during a November 1994 New Jersey shop meeting attended by D'Amico and LoPresti, one of the members orally assailed D'Amico's handling of the Seaman grievance, which involved a New York City shop.

At the Union's election in November 1994, 17 offices had to be filled.¹³ The candidates included then Vice President D'Amico, who ran for secretary-treasurer, and then Employment Director Rotoli, who ran for director of organizing. D'Amico, Rotoli, Brady, and John Conlon (who ran against Anthony Vartolo for executive vice president) put out campaign literature as a group; Rotoli testified that they did this in order to save money. Then President Brady, who was running for reelection, distributed campaign literature urging the election of D'Amico and Rotoli, among others. Some of the candidates ran as a group; these included LoPresti (who ran for president against incumbent Brady), Calderone (who ran against Rotoli), Caifano (who ran against D'Amico), Joseph Curto, and Vartolo. Vartolo's campaign literature attacked Brady and objected to "special deals" including a shop where "They even put a tender to take an [operator's] job" (inferentially, referring to the subject of the Seaman grievance).

¹³ The record suggests that six of these offices were each filled by a vote limited to a particular job classification. Six offices were uncontested.

Brady's campaign literature urged the electorate to vote against (among others) Caifano, Calderone, Curto, and Vartolo. At the election, D'Amico was defeated by Caifano, Rotoli was defeated by Calderone, and Brady was defeated by LoPresti; the successful candidates also included Curto and Vartolo.

Union counsel stated on the record that the issue presented by the Seaman grievance was "ultimately resolved in negotiations" about April 1997, two or three months before the expiration of the existing bargaining agreements. The record otherwise fails to show what post-election action was taken with respect to Seaman's grievance.

D. The Employment Card Filled out on D'Amico's Behalf on December 30, 1994

The Union's offices and the employment office are located in the same building. On Friday, December 30, 1994, D'Amico's last day as a paid union officer, then Employment Director Rotoli came to D'Amico's office and filled out on his behalf an employment card which gave, as his "branch," "Harris, Miehle, second pressman, on all presses."¹⁴ It is undisputed that D'Amico's original card remained in the employment office's active file until at least early April 1995 (see sec. II,G,2, below.).

E. The Employment Office's Determination as to Whether the Pressman with the Earliest Out-of-Work Date will be Contacted for a Pressman's Vacancy

At all relevant times, in response to an RFH for a first pressman, the employment office has contacted and referred only employees (when available) whose employment cards state that they are first pressmen. Also, before Composto became employment director, the employment office followed the practice of (1) where the RFH requested a second pressman, not contacting and referring a first pressman unless none of the qualified second pressmen has expressed interest in the job after being contacted by the employment office; and (2) initially contacting and referring second pressmen in response to RFH's which merely request pressmen without specifying first pressmen. Composto testified that he adhered to the practices set forth in the preceding sentence. Where the employment card states that the employee is a first pressman on some presses and a second pressman on others, the employment office observes this distinction in its contact and referral procedure.

Between no later than 1978 (when Bernstein, D'Amico's predecessor, was the employment director) and until Rotoli (D'Amico's successor) was removed from that job in January 1995, in determining (in response to a non-emergency RFH) whether a particular employee whose out-of-work date called for his referral was able to perform the duties of the job in question, the employment director relied upon the employment office's entries on the card in accordance with the employee's representations. For example, if the employer wanted a pressman to man a Miehle sheet-fed press, and the employment card of the pressman with the earliest out-of-work date stated that he

could operate "all presses," the employment director would contact that pressman about the job before contacting an employee with a later out-of-work date whose employment card specified Miehle sheet-fed presses in terms. If the employment director was uncertain whether the "all presses" pressman was capable of running the Miehle sheet-fed press, the employment director would ask him whether he could run that press and, if he said yes, would take his word for it and refer him to the job if he expressed interest.¹⁵ Williams explained this practice to Composto, whom she trained to operate the employment office. She credibly testified that where the contacted employee expressed some doubt about whether he could handle the job, she would suggest that he obtain further information about the job from the shop delegate; the record indicates that a similar practice was at least sometimes followed by Composto, who was employment director at all times material here (see sec. II,H, below). Moreover, Respondent's witness Curto, who worked in the trade for 37 years before becoming union vice president in January 1995, testified in February 1998 that the qualifications entered on the employment card were the only qualifications the employment director is supposed to use in making referrals. Furthermore, Henry Kick, who worked in the pressroom (eventually as an operator) between about 1952 and 1983 and thereafter served as union vice president until his retirement at the end of 1994, testified that if the employment director is unsure whether the employee with the earliest out-of-work date is qualified for the job in question, the director should contact that employee and ask him.

However, as to the basis for determining whether the employee with the earliest out-of-work date had qualifications which entitled him to be contacted in response to a particular RFH, Composto testified that his decisions about whether to contact a particular employee in connection with an RFH were sometimes made on the basis of information not on the employee's employment card if Composto had reason to believe something else other than what was on the card. For example, he testified that in terms of D'Amico's acquisition of jobs it probably would have made no difference if his employment card had specified all sheet-fed presses (in fact, the card filled out in his presence specified all presses; see below), because all Composto knew was that D'Amico could run only Harris presses.¹⁶ Moreover, in deciding whom on the employment list

¹⁵ My findings in these three sentences are based on credible parts of the testimony of D'Amico (who was trained by Bernstein, Volpe, and Williams), Rotoli (who was trained by D'Amico), Kick (a union vice president between 1984 and 1994), and Williams (a bookkeeper on the Union's payroll, who was trained by Volpe) about how to operate the employment office and did in fact operate it from time to time while D'Amico and Composto were employment directors and were temporarily absent.

¹⁶ However, Composto testified at another point that other than D'Amico's original card, which according to Composto claimed only Harris presses, when he allegedly copied that card onto a new-style card he would have had no knowledge as to what presses D'Amico worked on. Elsewhere, Composto testified that this alleged entry on the original card did not lead him to assume that D'Amico could run small Harris presses, because Composto knew the shop D'Amico came out of (MacNaughton) had large Harris presses, and "I assumed . . . he knew large Harris presses. Whether he knew small Harris presses or not I

¹⁴ My finding as to the entry is based on D'Amico's testimony, which was corroborated by Rotoli and which I credit for demeanor reasons and because of other considerations summarized below sec. II,M,3,c.

to contact, Composto testified that he took into consideration the particular shop's ability or willingness to train people, the particular shop's previously displayed selectivity in deciding whether to hire a particular employee, and whether a particular employee who did not have the earliest out-of-work date had run out of benefits and needed work in order to re-qualify for them. Moreover, as to some extent discussed below at section II,M,3,c, Composto testified that if D'Amico had the earliest out-of-work date, Composto would have contacted D'Amico for a second pressman's job on a press other than a Harris press (the only press specified on D'Amico's new-style employment card in its initial form and, according to Composto, on D'Amico's original card as well), "If it was a shop that I felt that he's got a chance and knew these people . . . maybe these people would give him an opportunity to learn the press he didn't know . . . I would consider [referring him to a non-Harris press] if I thought there was [a] chance that . . . I could send him there and he could [do] the job".

Because as to referral action the record is unusually difficult to work with, for the convenience of counsel and reviewing authority I have inserted relevant record references which are not intended to be exhaustive, and which should likely be omitted (as wholly unhelpful to the general reader) from any printed version of this decision.¹⁷ In working with the record, the following may be helpful: The employees' respective out-of-work dates are sometimes shown by the transcript of testimony, sometimes appear on the employee's employment card (not necessarily the one involved in the referral in questions) as the "Reporting Date" (on the top of the new-style cards, and about two-thirds of the way down on the old-style cards), and are sometimes shown on General Counsel's Exhibit 11, captioned "Employment Checkoff List" (see fn. 10, above). The absence of an employee's name from General Counsel's Exhibit 7, the last 1994 employment checkoff list (in the order of the employees' respective out-of-work dates, headed by the employee with the earliest out-of-work date, and with D'Amico's name next to the bottom), shows that as of that date the omitted employee either was working pursuant to referral by the employment office, had not reported his separation to the employment office, or had not yet initially registered with the employment office.¹⁸ However, because an employee does not lose his out-of-work date until he has worked for 15 days, it cannot be said that an employee whose name is not on that list, or who obtained a job through the employment office after December 1994, necessarily had an out-of-work date later than D'Amico's (whose out-of-work date was December 30, 1994, at all material times). General Counsel's Exhibit 10, the employment

don't know. . . . I would not assume that he [could run] any webs that are made by Harris. He's a sheet [fed pressman]. I certainly wouldn't think he knew those."

¹⁷ "Tr." references are to the transcript of testimony. "GC Exh." references are to the General Counsel's exhibits. "R. Exh." references are to Respondent's exhibits. References to "p" after exhibits are to the pages of the exhibit itself, which may or may not correspond to the page numbers as they appear on the original documents where pages have been photocopied.

¹⁸ GC Exh. 6, a purported employment checkoff list for the same period, was not received into evidence to show the truth of the contents.

transaction lists, sets forth the names of employees actually hired pursuant to referral by the employment office, and the dates on which they started to work according to the respective employers' reports to the unemployment fund; the list does not include referrals which did not result in hires, or employees (if any) hired from other sources. The transaction lists distinguish between pressman and other categories, but not between first pressman and second pressman. The transaction lists in the record are incomplete; more specifically, as to some weeks the records in the Union's files were missing when the transaction lists were subpoenaed by the General Counsel, and the General Counsel chose to offer into evidence the transaction lists with respect to only some of the weeks as to which the Union still had the lists in its files.¹⁹ As to some hires shown by the transaction lists, the testimony connects them with specific RFH's in the exhibit folder. As to other such hires, their connection with specific RFH's is a matter of inference from the face of the documents. As to other hires shown by the transaction list, the record contains no RFH's.²⁰ Furthermore, although almost all hires are the result of RFH's (see sec. II,B,2, above), and the employment office has a practice of drawing a line through RFH's when the job has been filled (Tr. 518), some of the RFH's with such lines do not appear to be connected with any hires shown on the transaction lists in evidence. Whether a pressman was a first pressman or a second pressman is usually shown by one of his employment cards (not necessarily the card used during the referral in question), but is sometimes shown by the transcript and is sometimes not shown at all.

Because the employment office has a practice of referring only first pressmen (if available) where first pressmen are requested for referral, and because D'Amico was a second pressman, many of the incidents resulting from express requests for first pressmen are not described herein. However, because the employment office has a practice of referring second pressmen unless first pressmen are expressly requested, and of referring the second pressman with the earliest out-of-work date where a first pressman has been requested but none is available, the subsequent discussion includes incidents resulting from requests for pressmen without further specification, as well as requests for second pressmen and referrals of second pressmen in response to requests for first pressmen. Because D'Amico could not operate web presses, the discussion below

¹⁹ The weeks as to which the Union retained no records are listed in GC Exh. 13. I have made no effort to ascertain the exact weeks as to which the General Counsel obtained transaction lists but chose not to introduce them.

²⁰ As discussed below, it is highly significant whether the various RFH's involved jobs which could be filled by second pressmen. As to referrals where other evidence is consistent with second pressmen RFH's but the RFH's are not in the record, the General Counsel requests me to infer, adversely to the Union, that all these RFH's could have been filled by second pressmen. However, the record fails to show that the Union routinely keeps all RFH's on file for any particular length of time. Moreover, during the hearing the General Counsel did not question union counsel's assertion that the Union had produced all the RFH's between January 1994 and September 1997 (inferentially, all those still in the Union's possession) in compliance with the General Counsel's subpoena. Under the circumstances, I decline to draw any adverse inference against Respondent.

at section II,F-K is mostly limited to jobs on sheet-fed presses; see section II,L and M,3,c, below.²¹

F. RFH's and Referrals Mostly Prior to the Time Period (After About March 13, 1995) Specified in the Complaint (Incidents 1–22)

Incident 1.—An RFH form dated January 3, 1995, states that employer Sam Jones wanted a second pressman for a Roland 6-color press (GC Exh. 9 p. 1, Tr. 512–513). The record fails to show who, if anyone, was referred, and so far as the record shows, Sam Jones did not hire anyone through the employment office through the end of August 1995. The employment service did not contact D'Amico about this job.

Incident 2.—An RFH form dated January 10, 1995, states that employer Atwater wanted a pressman on a 4-color Miehle 40-inch press to start on January 11 (GC Exh. 9 p. 2). The form does not specify either a first pressman or a second pressman. Pursuant to a referral from the employment office, Atwater put Andrew T. Ruggiero, a first pressman, to work on January 11 (GC Exh. 10 p. 3, R Exh. 16 p. 2, Tr. 761). His out-of-work date was earlier than D'Amico's (GC Exh. 7 p. 3). The employment office did not contact D'Amico about this job.

Incident 3.—An almost illegible RFH dated January 11, 1995 (Tr. 514, 515, GC Exh. 9 p. 3) requests a pressman (without specifying a first pressman or a second pressman) for a firm whose name I read as "Sandy" on a press which may have been a 6-color Harris. Pursuant to referrals from the employment office, pressmen Thomas F. Scotti and James F. Liscoe started to work for employer Sandy Alexander Inc. on January 17 (GC Exh. 10 p. 5). The record fails to show the out-of-work date of either of these pressmen, or whether they were first pressmen or second pressmen. The employment office did not contact D'Amico about these jobs.

Incident 4.—An RFH form dated January 11, 1995, states that employer Sanford wanted a pressman (without specifying a first pressman or a second pressman) to operate a 5-color Komori (Tr. 515, GC Exh. 9 p. 4). A line through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral from the employment office, pressman Angelo M. Rivera started to work for Sanford on January 17, 1995 (GC Exh. 10 p. 5). The record fails to show whether he was a first or a second pressman. His out-of-work date was earlier than D'Amico's (GC Exh. 7 p. 4). The employment office did not contact D'Amico about this job.

Incident 5.—An RFH form dated January 16, 1995, states that employer Crestwood wanted a second pressman to report on January 16, 1995, to work on a "Miehle Roland [?] 6 color w/console" (Tr. 515, GC Exh. 9 p. 5). A line through the RFH shows that the job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman Richard J. Gonnelli started to work for Crestwood on January 17 (GC Exh. 10, p. 5). The record fails to show whether he was a first pressman or a second pressman. His name appears on the last 1994 employment list (GC Exh. 7 p. 3), but the record otherwise fails to show his

out-of-work date. The employment office did not contact D'Amico about this job.

Incident 6.—Pursuant to a referral by the employment office, pressman Henry P. Cristadoro began to work for employer Terwilliger, DL-STE (Terwilliger) on January 24, 1995 (Tr. 545–546, GC Exh. 10 p. 6). The record fails to show whether Terwilliger requested a first pressman, a second pressman, or merely a pressman; whether Cristadoro was a first pressman or a second pressman; or what press was to be used. Cristadoro's out-of-work date was later than D'Amico's (Tr. 546, GC Exh. 11 p. 1). The employment office did not contact D'Amico about this job.

Incident 7.—Pursuant to a referral by the employment office in response to an RFH dated January 27, 1995, for a "second man, Heidelberg, Komori" (sheet-fed presses) to start on January 30, George Weeks began to work for employer Milo Andrew Press on February 1, 1995 (Tr. 515, 773–774, R. Exh. 28, GC Exh. 9 p. 6, GC Exh. 10 p. 7). Weeks was a second pressman on sheet-fed presses (GC Exh. 8 p. 15). His out-of-work date was later than D'Amico's (Tr. 545, R. Exh. 28 p. 2, GC Exh. 11 p. 5). The employment office did not contact D'Amico about this job.

Incident 8.—An RFH form dated January 27, 1995, states that on January 30 employer Rapoport wanted a second pressman on a 40-inch Miehle press (perhaps, a 6-color press) with a console (Tr. 515, GC Exh. 9 p. 7). A line drawn through the RFH shows that the job was filled (Tr. 518). Pursuant to a referral from the employment office, pressman Carl Guarino began to work for Rapoport on February 1 (GC Exh. 10 p. 7). His name appears on the last 1994 employment list (GC Exh. 7 p. 4); but the record otherwise fails to show his out-of-work date. The employment office did not contact D'Amico about this job.

Incident 9.—An RFH form dated February 2, 1995, states that employer Bengal Graphics wanted a pressman on a 40-inch Heidelberg (Tr. 516, GC Exh. 9 p. 9). The form does not specify either a first pressman or a second pressman. A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral from the employment office, Bengal Graphics put pressman Philip D'Amico (no kin to the charging party, so far as the record shows) to work on February 8, 1995 (GC Exh. 10 p. 8). Philip D'Amico's out-of-work date was later than charging party Richard E. D'Amico's (GC Exh. 11 p. 2). The record fails to show whether Philip D'Amico was a first pressman or a second pressman. The employment office did not contact Richard E. D'Amico about this job.

Incident 10.—An RFH form dated February 10 or 12, 1995, states that employer Terwilliger wanted two first pressmen, a second pressman on a 4-color Harris/two-color Miehle, and another second pressman on a 6-color Komori (GC Exh. 9 p. 11). A line drawn through the RFH shows that these jobs were filled (Tr. 518). Pursuant to referrals by the employment office, first pressman Andrew Ruggiero, first pressman Arthur Commisso, pressman Peter McGurty, and pressman Lawrence Jacobson were put to work by Terwilliger on February 15, 1995 (GC Exh. 10 p. 9, R. Exh. 14 p. 3, Tr. 753). Jacobson's name appears on the last 1994 employment list (GC Exh. 7 p. 4), but as of the week ending March 10, 1995, his out-of-work date

²¹ On a web press, a roll of paper is put into the press, and is printed before being cut into sheets. On a sheet-fed press, the paper is cut into sheets before being put into the press. Composto credibly testified that web pressman and sheet-fed pressman are not interchangeable positions.

was February 14, 1995, later than D'Amico's (GC Exh. 11 p. 4). The record fails to show McGurty's out-of-work date. I infer that Jacobson (and McGurty) were referred and hired as second pressmen. The employment office did not contact D'Amico about any of these jobs.

Incident 11.—An RFH form dated February 17, 1995, states that employer Jet Litho wanted a second pressman on a 6-color Komori (Tr. 517–518, GC Exh. 9 p. 14). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman William Gillespie started to work for Jet Litho on February 22, 1995 (GC Exh. 9 p. 11). The record fails to show his out-of-work date, or whether he was a first pressman or a second pressman. The employment office did not contact D'Amico about this job.

Incident 12.—An RFH form dated February 17, 1995, states that employer Westway wanted a second pressman on a 6-color Heidelberg (Tr. 517, GC Exh. 9 p. 13). An RFH form dated on February 21 states that Westway requested a second pressman on a 40-inch Heidelberg press, "immediately" (GC Exh. 9 p. 17, Tr. 518–519). The employment office referred pressman Robert Helriegel to Westway for a job to start on February 22, 1995. His employment card states that he had experience as a second pressman on Komori, Heidelberg, and Harris presses; and Composto testified that Helriegel was probably referred as a second pressman (R. Exh. 37, Tr. 782–783, 840–842). Although lines drawn through the Westway RFH's show that these jobs were filled, and the weekly transaction list fails to show what employee or employees filled them, I infer that Westway did not hire Helriegel, because he was referred to and hired by employer Herst Litho for a job which started on February 22 (GC Exh. 10 p. 11, Tr. 518, 550). The record fails to show whether Herst requested a first pressman, a second pressman, or simply a pressman; or the press involved. Laying his employment card to one side, the record fails to show whether Helriegel was referred as a first pressman or a second pressman. There is no evidence that anyone else was referred to or hired by Westway. Helriegel had a later out-of-work date than D'Amico's (R. Exh. 37, GC Exh. 11 p. 1). The employment office did not contact D'Amico about either of these jobs.

Incident 13.—An RFH form dated February 21, 1991, states that employer Norman Lefkoff wanted a pressman, without specifying either a first pressman or a second pressman, and without specifying the kind of press (Tr. 518, GC Exh. 9 p. 15). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman Jesus Alvarado started to work for Lefkoff on February 22, 1995 (GC Exh. 10 p. 11). The record fails to show Alvarado's out-of-work date, or whether he was a first pressman or a second pressman. The employment office did not contact D'Amico about this job.

Incident 14.—An RFH form dated February 21, 1995, states that employer Gerson wanted a second pressman on a 4-color Harris press (GC Exh. 9 p. 18). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral from the employment office, first pressman Thomas J. Shea started to work for Gerson on February 22 (GC Exh. 10 p. 11, R. Exh. 57). Shea's name appears on the last 1994 employment list (GC Exh. 7 p. 4), but the record otherwise fails to show his

out-of-work date. The employment office did not contact D'Amico about these jobs.

Incident 15.—An RFH form dated February 21, 1995, states that employer Barton Press wanted a second pressman on a 40-inch Heidelberg (Tr. 518, GC Exh. 9 p. 16). An RFH form dated February 22, 1995, states that Barton wanted two second pressmen for a 60-inch Harris press, to begin on February 27 (GC Exh. 9 p. 19). Lines drawn through these RFH's show that these jobs were filled (Tr. 518). Pursuant to referrals from the employment office, pressmen Berton W. Palmer and Ronald Traina were put to work by Barton on February 22 (GC Exh. 10 p. 11). Traina, who had an earlier out-of-work date than D'Amico's, is a first pressman on a 4 color Heidelberg and on a 60-inch Harris press (R. Exh. 53, GC Exh. 11 p. 11). The record fails to show whether Palmer was a first or a second pressman, or his out-of-work date. Barton put pressmen Armando Bilancione and Joseph Blankenship to work on March 1 (GC Exh. 10 p. 13). Bilancione, who had a later out-of-work date than D'Amico's, is a first pressman on some presses and a second pressman on others (see fn. 26, below). Composto testified that Bilancione had worked for Barton until the end of 1994, and that Barton had recalled him (R. Exh. 55, GC Exh. 11 p. 1, Tr. 551–552, see *infra* Part M 3b). The record fails to show whether Blankenship was a first pressman or a second pressman. His name appears on the last 1994 employment list, but the record otherwise fails to show his out-of-work date (GC Exh. 7 p. 2). The employment office did not contact D'Amico about any of these jobs.

Incident 16.—An RFH form dated February 14, 1995, states that employer Litho Art wanted a first pressman on a Komori or a second pressman on a Miehle, to start on February 16 (GC Exh. 9 p. 12). A line drawn through the RFH shows that the job was filled (Tr. 518). Pursuant to a referral from the employment office, Litho Art put pressman John Zoccali to work on February 22 (GC Exh. 10 p. 11). His name appears on the last 1994 employment list, but the record otherwise fails to show his out-of-work date (GC Exh. 7 p. 5). The record fails to show whether he was a first pressman or a second pressman, or which job he was referred to. The employment office did not contact D'Amico about a job with Litho Art.

Incident 17.—An RFH form dated February 24, 1995, states that employer Milo Andrew Press requested the referral of employee Weeks as a second pressman on a Heidelberg and a 6-color Komori to start Monday, February 27 (Tr. 519, GC Exh. 9 p. 20). A line drawn through the RFH shows that the job was filled (Tr. 518). Pursuant to a referral from the employment office, pressman John Zoccali was put to work by Milo on March 1, 1995 (GC Exh. 10 p. 13). His name appears on the last 1994 employment list, and he had been put to work by Litho Art on February 22, but the record otherwise fails to show his out-of-work date (GC Exh. 7 p. 5, GC Exh. 10 p. 11). The record fails to show whether he was a first pressman or a second pressman. The employment office did not contact D'Amico about this job.

Incident 18.—An RFH dated February 27, 1995, states that employer Zuckerman–Crestwood was requesting the immediate referral of a second pressman for a 4-color, 40-inch Heidelberg Speedmaster (Tr. 518, GC Exh. 9 p. 21). The form suggests that

employees Joe Ferguson or Persad were being requested by name. A line drawn through the RFH indicates that the job was filled (Tr. 518, GC Exh. 9 p. 21). Pursuant to a referral from the employment office, Zuckerman put pressman Ramnanan Persad to work on March 1 (GC Exh. 10 p. 13). His out-of-work date was earlier than D'Amico's (GC Exh. 11 p. 6).²² The record fails to show whether Persad was a first pressman or a second pressman. The employment office did not contact D'Amico about this job.

Incident 19.—An RFH form dated “3-3” states that employer Barton Press was requesting a second pressman on a 4-color, 60-inch Harris press for “tomorrow night 3/31/95” (GC Exh. 9 p. 22, Tr. 519–520). An RFH form dated March 10, 1995, states that Barton wanted a second pressman on a 5-color, 60-inch Harris press to start on March 13, 1995 (Tr. 520, GC Exh. 9 p. 25). An RFH form dated April 4, 1995, states that Barton was requesting two first pressmen (but “Will take 1st pressman and 2nd pressman”) for a 6-color Heidelberg press (R. Exh. 31). Pursuant to a referral by the employment office, Barton put pressman Michael Lepore to work on March 7, 1995 (GC Exh. 10 p. 14). His name appears on the last 1994 employment list (GC Exh. 7 p. 4), but the record otherwise fails to show his out-of-work date; nor does the record show whether he was a first pressman or a second pressman. Pursuant to referrals from the employment office, Barton put pressmen Joseph Blankenship and William Ruggiero to work on April 4 (GC Exh. 10 p. 19). Ruggiero was a first pressman whose out-of-work date was later than D'Amico's (Tr. 761, GC Exh. 11 p. 4). The record fails to show whether Blankenship was a first pressman or a second pressman. His name appears on the last 1994 employment list, and he had worked for Barton for a period beginning March 1, 1995, but the record fails to show whether he had subsequently worked long enough to acquire a new out-of-work date (GC Exh. 7 p. 2). The employment office never contacted D'Amico about any job with Barton.

Incident 20.—An RFH form dated February 6, 1995, states that employer Atwater wanted a second pressman on a 4-color Miehle for 2 weeks to begin on March 7 (Tr. 517, GC Exh. 9 p. 10). Under “Remarks” is the handwritten entry “Joe Castaldo #14886 Working.” The RFH entries appear to be in Composto's handwriting, except that the word “Working” appears to be in a different handwriting than the rest of the entries. The transaction list for the week ending March 15 is missing from the Union's files (GC Exh. 13, Tr. 934). A line drawn through the form shows that the job was filled (GC Exh. 9 p. 10, Tr. 518). Pressman Christendat Ragubee started to work for Atwater on March 7 (GC Exh. 10 p. 14). His name appears on the last 1994 employment list, but the record otherwise fails to show his out-of-work date; nor does it show whether he was a first pressman or a second pressman (GC Exh. 7 p. 4). The employment office did not contact D'Amico about this job.

Incident 21.—An RFH form dated March 9, 1995, states that employer Litho Art was requesting a first and/or a second pressman on a Komori for March 13 (Tr. 520, GC Exh. 9 p.

23). The form suggests that the employer was requesting the referral of “Mike Scott” and/or “Zocalli.” A line drawn through the form shows that the job was filled (Tr. 518, GC Exh. 9 p. 23). The employment office's transaction list for the week ending March 15 is missing from the Union's files (GC Exh. 13, Tr. 934), and the record fails to show who was referred or hired for this vacancy. The employment office did not contact D'Amico about it.

Incident 22.—An RFH form dated March 9, 1995, states that employer Rapoport was requesting a first and a second pressman on a 6-color Miehle press to begin March 13 (Tr. 520, GC Exh. 9 p. 24). A line through the RFH shows that these jobs were filled (Tr. 518). The weekly transaction list for the week ending March 15 is missing from the Union's files (GC Exh. 13, Tr. 934). The weekly transaction lists which are in the record fail to show that Rapoport hired any pressman until April 25, 1995 (GC Exh. 10 p. 22) (see Incident 42, below). The employment office did not contact D'Amico about these vacancies.

As previously noted, the complaint does not allege that the employment office's action before about March 13 violated the Act. Because no contention is made that D'Amico, a second pressman, should have been referred pursuant to a request for a first pressman, referrals limited to first pressmen pursuant to requests for first pressmen have not been addressed herein. However, as previously noted, Composto testified that in response to requests for pressmen, he would refer second pressmen unless first pressmen were specifically requested.

G. RFH's and Referrals Between March 13 and July 26, 1995 (Incidents 23–70)

1. March 1995 referrals (Incidents 23–39)

Incident 23.—An RFH dated March 13, 1995, states that employer Master Eagle requested a second pressman on a 4-color, 40-inch Heidelberg, to begin on March 14 (GC Exh. 9 p. 26). A line drawn through this RFH shows that the job was filled (Tr. 518). However, the employment office's transaction lists for this week are missing from the Union's files (GC Exh. 13, Tr. 934), and the record fails to show who was referred or hired for this job. The employment office did not contact D'Amico about it.

Incident 24.—An RFH form states that on March 16, 1995, employer Terwilliger requested a second pressman on a 4-color Harris press, and also two first pressmen, to start Monday, March 20 (GC Exh. 9 p. 27). A line drawn through the RFH shows that these jobs were filled (Tr. 518). The employment office referred first pressman Albert Castagnetta, who was interviewed by Terwilliger on March 22 and began working for it as a first pressman (GC Exh. 10 p. 17, R. Exh. 39, Tr. 784–785). The employment office also referred pressman Ronald Traina, who also started to work for Terwilliger on March 22, 1995 (R. Exh. 53, GC Exh. 10 p. 17). His employment card states that he is a first pressman on a 4-color Heidelberg and a 60-inch Harris (R. Exh. 53); but the record otherwise fails to show whether he was referred or hired as a first pressman or as a second pressman. Castagnetta's out-of-work date was later than D'Amico's (Tr. 553); Traina's out-of-work date was ear-

²² So far as the record shows, Crestwood hired no pressmen until March 22, when the employment office referred Paul Kovacs (see Incident 26, below).

lier than D'Amico's (GC Exh. 7 p. 11). D'Amico was never contacted about this second pressman's job.

Incident 25.—As testimonially explained by Composto, an RFH form dated March 21, 1995, states that employer Westway was requesting two second pressmen on a 6-color Heidelberg to begin on March 27 (Tr. 521, GC Exh. 9 p. 28). The RFH indicates that pressman Joe Ferguson was being requested, and that union executive vice president Vartolo had said no (GC Exh. 9 p. 28). A line drawn through the RFH shows that the jobs were filled (Tr. 518), but the record otherwise fails to show when they were filled or which employees filled them. The employment office failed to contact D'Amico about them.

Incident 26.—An RFH form dated March 21, 1995, states that employer Crestwood Printing was making a request with respect to a 5-color Heidelberg "ASAP." When initially shown this RFH (which was then marked and later that day received as p. 29 of GC Exh. 9), and upon being asked, "it looks like they're looking for a first and second pressman?" Composto replied (as an adverse witness for the General Counsel) "Heidelberg" (Tr. 521). When later shown this same RFH (which was then marked and later received, as the second page of R. Exh. 9), and upon being asked whether Crestwood was requesting a first pressman or a second pressman, Composto testified for Respondent (Tr. 752), "I didn't write this [RFH] out. So I am not too sure whether they asked for a first and a second or they asked for somebody that would act as a first or second . . . it doesn't say more than one person, so it maybe . . . that . . . the man would primarily have been a first man but they may have wanted a first man that was willing to act as a second man, because some first men won't do it." Pressman Paul Kovacs started to work for Crestwood on March 22, 1995; Composto testified for Respondent that Kovacs was referred pursuant to this RFH (Tr. 752, GC Exh. 10 p. 17). Kovacs' out-of-work date was later than D'Amico's (Tr. 554). As to whether he was a first pressman or a second pressman, see *infra* Incident 61, Part II G5. The employment office never contacted D'Amico about this job.

Incident 27.—An RFH form dated March 22, 1995, states that employer Atwater was requesting a second pressman "next week" on a 40-inch, 4-color Miehle (GC Exh. 9 p. 30). The RFH card states, "Has to know how to handle paper," and also states "Request #14886. No." A line drawn through this RFH shows that the job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman Arthur Ebner (folio number 17409) started to work for Atwater on March 28, 1995 (GC Exh. 10 p. 18). Ebner's name is on the last 1994 employment list, but the record otherwise fails to show his out-of-work date (GC Exh. 7 p. 3). The employment office never contacted D'Amico about this job.

Incident 28.—Pursuant to a referral by the employment office, first and second pressman Raymond T. Koziatsek started working for employer Pictorial Offset on March 22, 1995 (GC Exh. 10 p. 17, Tr. 554). His employment card states that he is capable of operating a sheet-fed Harris press (the kind is illegible) and various web presses (which Pictorial has, and D'Amico cannot operate) (R. Exh. 40, Tr. 785–786, 839–840). The relevant RFH is not in the record. There is no evidence as to what press Koziatsek was expected to operate or as to whether

a first pressman, a second pressman, or merely a pressman was requested, or as to whether he was hired as a first or as a second pressman. His out-of-work date was later than D'Amico's (R. Exh. 40). The employment office never contacted D'Amico about this job.

Incident 29.—An RFH dated March 24, 1995, states that employer Moe Zuckerman wanted a "pressman" (without specifying a first or a second pressman) for a 2-day job on an unspecified kind of press. Pressman "Ray Persad" was requested by name (GC Exh. 9 p. 31). With Union Vice President Curto's approval, Ramnanan Persad started to work for Zuckerman on March 28, 1995 (GC Exh. 9 p. 31, GC Exh. 10 p. 18). The record fails to show whether he was referred or hired as a first pressman or a second pressman. Persad's out-of-work date was earlier than D'Amico's (GC Exh. 11 p. 6). The employment office never contacted D'Amico about this job.

Incident 30.—Second pressman Robert Hopkins, with an out-of-work date later than D'Amico's, was referred to employer TFH for a job to start on March 26, 1995 (Tr. 830–831, R. Exh. 49, R. Exh. 17 p. 2).²³ So far as the record shows, TFH did not hire him until June 27, 1995, and so far as the record shows, the only other pressman TFH hired during this period was Benjamin Caban, a web pressman referred to TFH on June 21 (GC Exh. 8 p. 22, GC Exh. 10 p. 33). Hopkins' employment card sets forth a number of presses, including sheet-fed presses, which he was at least allegedly capable of operating. The record fails to show the press for the TFH job or jobs to which he was referred and/or hired. Composto testified (Tr. 793) that Hopkins was "a lot more qualified" than D'Amico, who was not contacted in this connection.

Incident 31.—The employment office referred first pressman (sheet-fed) James Anderson to a job on a Heidelberg press with employer Crestwood Printing to begin on March 27, 1995 (Tr. 786, R. Exh. 41). He started to work for Crestwood on March 28 (GC Exh. 10 p. 18). The record fails to show whether Crestwood requested a first pressman, a second pressman, or merely a pressman, or whether he was referred or hired as a first or a second pressman. His out-of-work date was later than D'Amico's (R. Exh. 41). The employment office never contacted D'Amico about this job.

Incident 32.—Peter Pignatore's employment card states that he is a pressman on both web and sheet-fold presses, and does not specify whether he is a first or a second pressman (R. Exh. 29). Composto testified that Pignatore was hired as a second pressman by employer Banknote on March 21, 1995, pursuant to an RFH dated March 9, 1995, for a permanent second pressman on a web press beginning on March 13, 1995 (Tr. 774–775, R. Exh. 29). The employment office's transaction list for the week ending on March 15, 1995, is missing from the Union's files (GC Exh. 13, Tr. 934–935). The employment transaction list for the week ending March 29, 1995, specifies a starting date for Pignatore with Banknote of March 28 (GC

²³ As written by Composto, the RFH states that the job was to begin on "2–26–95." (Tr. 794). However, after Composto's attention was drawn to the fact that the RFH gave Hopkins' out-of-work date as "3–16–95," Composto testified that "My guess is I put the wrong starting date and he probably started 3/26/95" (Tr. 794).

Exh. 10 p. 18). Pignatore's out-of-work date was later than D'Amico's (GC Exh. 29). The employment office never contacted D'Amico about a job with Banknote. The final 1994 employment checkoff list states that Peter Pignatore Jr. is a web pressman (GC Exh. 7 p. 4).

Incident 33.—An RFH form dated March 30, 1995, states that employer Pace Press wanted a pressman for a 4-color Heidelberg to start on April 3. The RFH does not specify whether a first pressman or a second pressman was wanted. (Tr. 521, GC Exh. 9 p. 33). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman James K. Smith started to work for Pace on April 4, 1995 (GC Exh. 8 p. 1, GC Exh. 10 p. 19). The record fails to show whether he was a first pressman or a second pressman. His out-of-work date was earlier than D'Amico's (GC Exh. 8, GC Exh. 11 p. 6). The employment office never contacted D'Amico about this job.

Incident 34.—An RFH form dated March 30, 1995, states that employer Sanford Graphics wanted a second pressman on a 5-color Heidelberg and a 4-color Harris (Tr. 521–522, GC Exh. 9 p. 34). This form contains a notation that Sanford had requested one of two individuals by name, and that this request had been denied by Curto. An April 4 RFH states that Sanford wanted a pressman (without specifying a first or a second pressman) on a 5-color Heidelberg and 4-color Harris (Tr. 522, GC Exh. 9 p. 35) to “Start tonight.” Lines drawn through the RFH's show that these jobs were filled (Tr. 518). Pursuant to referrals by the employment office, pressmen Abraham Otero and Ramnanan Persad started to work for Sanford on April 4, 1995 (GC Exh. 10 p. 19). Otero's name is on the last 1994 employment list, but the record otherwise fails to show his out-of-work date (GC Exh. 7 p. 1). Persad had started to work for employer Zuckerman on March 28 (see *supra* Incident 29), but when he started working for Zuckerman has out-of-work date was November 18, 1994, and the record fails to show whether his employment thereafter (including his stint with Zuckerman) was long enough to change his out-of-work date, which (if so changed) would have been later than D'Amico's (see fn. 5, above). The record fails to show whether either Otero or Persad was a first pressman or a second pressman. The employment office never contacted D'Amico about a job with Sanford Graphics.

2. D'Amico's alleged new-style employment card

Composto testified that the new-style employment card which he prepared with respect to D'Amico stated in its initial form that D'Amico could act as a second pressman on Harris presses only, and that Composto prepared this new-style card in early April 1995. This new-style card was not seen by D'Amico at any material time.

3. April 1995 referrals (Incidents 35–42)

Incident 35.—An RFH form dated April 4, 1995, states that employer Barton Press wanted two first pressman (but “will take 1st pressman and 2nd pressman”) on a 6-color Heidelberg press (R. Exh. 31 p. 1). Pursuant to this RFH, the employment office referred sheet-fed second pressman Richard S. Cannizzaro, with a later out-of-work date than D'Amico's, and first pressman Louis J. Castrovinci (R. Exh. 13 p. 2, R. Exh. 31 p. 2,

GC Exh. 10 p. 21, Tr. 564–565, 756–757).²⁴ Barton put both of them to work on April 12 (GC Exh. 10 p. 21). The employment office did not contact D'Amico about a job with Barton.

Incident 36.—An RFH form dated April 11, 1995, states that employer Litho Art wanted a second pressman on Monday, April 17, for a 6-color Miehle press (Tr. 522, GC Exh. 9 p. 36). A line drawn through the RFH shows that this job was filled (Tr. 518). The employment office referred James Vacca, a sheet-fed second pressman with a later out-of-work date than D'Amico's, to Litho Art, which put him to work on April 12, 1995 (GC Exh. 8 p. 8, GC Exh. 10 p. 21, GC Exh. 11 p. 8). The employment office never contacted D'Amico about this job.

Incident 37.—First pressman Leon Hall, with an earlier out-of-work date than D'Amico's, was referred to employer Bengal Graphics, which put him to work on April 12, 1995 (GC Exh. 8 p. 6, GC Exh. 10 p. 21). The record fails to show whether Bengal requested a first pressman, a second pressman, or merely a pressman, and what kind of press was involved. The employment office never contacted D'Amico about this job.

Incident 38.—An RFH form dated April 17, 1995, states that on April 18, employer Gerson wanted a second pressman on a 4-color Harris press (Tr. 523, GC Exh. 9 p. 38). An RFH form dated April 21, 1995, states that employer Gerson wanted a pressman (without specifying a first or a second pressman) on a Heidelberg press, to start April 24 (Tr. 523–524, GC Exh. 9 p. 39). Lines drawn through the RFH's show that these jobs were filled (Tr. 518). The employment office referred Vincent Spertuto to Gerson, where he started to work on April 25 (Tr. 561–562, 787–788, 836–837, R. Exh. 43, GC Exh. 10 p. 22). Spertuto was a first pressman as to certain presses (including a Heidelberg), and Composto testified that Spertuto was probably referred to a Heidelberg job; but Composto's testimony at transcript 836–837 suggests that Spertuto was a second pressman as to a Harris press, and the record otherwise fails to show whether Gerson hired him as a first pressman or a second pressman (R. Exh. 43, Tr. 788). His out-of-work date was later than D'Amico's (Tr. 561–562, R. Exh. 43, GC Exh. 11 p. 1). So far as the record shows, Gerson hired no other pressmen at any material times. The employment office never contacted D'Amico about either Gerson job.

Incident 39.—A pressman whose name I read as Ralph Periso (it is almost illegible on the exhibit), with an out-of-work date earlier than D'Amico's, was referred to a job with employer MacNaughton to start on April 17, 1995 (GC Exh. 8 p. 10). The employment office's transaction list for the week ending April 17 is missing from the union's files (GC Exh. 13, Tr. 934). There is no evidence that MacNaughton ever hired Periso. The record fails to show whether MacNaughton requested a first pressman, a second pressman, or merely a pressman, or whether Periso was referred as a first or a second pressman. Nor does the record show the kind of press involved. The employment office never contacted D'Amico about this job.

Incident 40.—An RFH form dated April 21, 1995, states that on May 1 employer Crestwood Printing wanted a second

²⁴ The record does not include Cannizzaro's work slip for this job. R. Exh. 13, p. 2, is relied on to show that Cannizzaro was a sheet-fed second pressman.

pressman on a Heidelberg press (Tr. 523–524, R. Exh. 13 p. 1, GC Exh. 9 p. 40). Richard Cannizzaro, with an out-of-work date later than D’Amico’s, was referred to this job, where he started working on May 1 (Tr. 756–758, 564–565, R. Exh. 13 p. 2, GC Exh. 9 p. 40, GC Exh. 10 p. 24, GC Exh. 11 p. 7). His employment card identifies him as a “2nd pressman S/F” (sheet-fed) (R. Exh. 13 p. 2). The employment office never contacted D’Amico about this job.

Incident 41.—Second pressman Michael Knipl, with an earlier out-of-work date than D’Amico’s, was referred to a job with Crestwood, which put him to work on April 24, 1995 (GC Exh. 8 p. 13, GC Exh. 10 p. 22). The record fails to show the kind of press involved (although his employment card states “Doesn’t know Heil”). The employment office did not contact D’Amico about this job.

Incident 42.—An RFH form dated April 12, 1995, states that employer Rapoport wanted at least one second pressman (plus at least one first pressman) “tonight” for a 40-inch 6-color press, perhaps a Mitsubishi (Tr. 522–523, GC Exh. 9 p. 37). An RFH form dated April 24, 1995, states that “ASAP,” Rapoport wanted a second pressman for a 40-inch 6-color Miehle press (Tr. 524, GC Exh. 9 p. 41). This press is a sheet-fed press (see *Incident 49*, below). Lines through both RFH’s show that the jobs were filled (Tr. 518). The employment office referred pressman George Weeks, with an out-of-work date later than D’Amico’s. Weeks’ employment card states that he cannot perform as a first pressman on sheet-fed presses (Tr. 562, GC Exh. 8 p. 15, GC Exh. 11 p. 2). Weeks started to work for Rapoport on April 25 (GC Exh. 10 p. 22, Tr. 562). First pressman Thomas L. Adams, with a later out-of-work date than D’Amico’s, was also referred to Rapoport, for a job to begin on April 17 (GC Exh. 8 p. 11). The employment office’s transaction list for the week ending April 17 is missing from the Union’s files (GC Exh. 13, Tr. 934–935). The name of an employee identified in the record merely as having the surname “Adams” disappeared from the weekly employment list after the week ending April 7; the record does not mention anyone with that surname other than Thomas Adams (GC Exh. 13, Tr. 934–935). I infer that Rapoport put him to work about April 17. The record fails to show whether he was referred pursuant to a request for a first pressman, a second pressman, or merely a pressman. The employment office never contacted D’Amico about a job with Rapoport.

4. May 1995 RFH’s and/or referrals (Incidents 43–48)

Incident 43.—An RFH form dated May 5, 1994 (Composto, who wrote it, testified that it should have been dated 1995) states that employer Litho Art wanted a second pressman on May 5 for an unspecified press (Tr. 524–525, GC Exh. 9 p. 42). A line through the RFH shows that the job was filled (Tr. 518). The employment office’s transaction list for the week ending May 10 is missing from the Union’s files (GC Exh. 13, Tr. 934–935). The record fails to show who was referred to or hired for this job. The employment office never contacted D’Amico about it.

Incident 44.—An RFH form dated May 10, 1995, states that employer Gerson wanted a first or second pressman on a Komori press (Tr. 525, GC Exh. 9 p. 43). The RFH form indicates

that Gerson requested a particular pressman by name, and that Calderone said no (GC Exh. 9 p. 43). A line across the form shows that the job was filled (Tr. 518). The employment office’s transaction lists for the weeks ending May 10 and 17 are missing from the Union’s files (GC Exh. 13, Tr. 934–935). The record fails to show who was referred to or hired for this job. The employment office never contacted D’Amico about it.

Incident 45.—An RFH form dated May 12, 1995, states that employer Terwilliger wanted a second pressman on a 6-color Miehle press (Tr. 525, GC Exh. 9 p. 44). A line through the RFH shows that this job was filled (Tr. 518). The employment office’s transaction list for the week ending May 17 is missing from the Union’s files (GC Exh. 3, Tr. 534–535). The next hire of a pressman by Terwilliger reflected on the transaction lists in the record occurred on July 10, 1995 (GC Exh. 10 p. 36). The employment office never contacted D’Amico about a May job with Terwilliger.

Incident 46.—An RFH form dated May 16, 1995, states that employer Scott Press wanted a second pressman on a 2-color Heidelberg to begin Monday, May 22, with a request for Arthur Faerber (Tr. 525, GC Exh. 9 p. 45, R. Exh. 48). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral by the employment office, sheet-fed pressman Faerber, with a later out-of-work date than D’Amico’s, was put to work for Scott on May 30 (GC Exh. 10 p. 26, R. Exh. 48). The record fails to show whether he was a first pressman or a second pressman; or whether Scott’s request for Faerber was approved by a union officer. The employment office never contacted D’Amico about this job.

Incident 47.—An RFH form dated May 22, 1995, states that employer Arkay Packaging wanted a second pressman on a 40-inch, 4-color Heidelberg (Tr. 525, GC Exh. 9 p. 46). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral from the employment office, pressman Kumi Daniel began to work for Arkay on May 30, 1995 (GC Exh. 10 p. 26). His name does not appear on the last 1994 employment list (GC Exh. 7); the record otherwise fails to show his out-of-work date. Because Arkay required more than one pressman to be referred for a single vacancy, pressman Christend Ragubeer, with an earlier out-of-work date than D’Amico’s, and also an unidentified third man, were also referred for this job (GC Exh. 11 p. 15, Tr. 525). The record fails to show as to any of the referred employees whether they were first pressman or second pressmen. The employment office never contacted D’Amico about the job.

Incident 48.—An RFH form dated May 30, 1995, states that employer Moe Zuckerman wanted a second pressman on a 4-color Heidelberg, to start May 31 (Tr. 526, GC Exh. 9 p. 48). A line drawn through the RFH shows that this job was filled (Tr. 518). Pursuant to a referral by the employment office, pressman Ronald Traina started to work for Zuckerman on May 31 (GC Exh. 10 p. 27). His employment card states that he is a first pressman on 4-color Heidelbergs (as well as 60-inch Harris), and a second pressman on larger Heidelbergs (R. Exh. 53). His out-of-work date was earlier than D’Amico’s (GC Exh. 11 p. 16). D’Amico was never contacted about this job.

5. June 1995 referrals (Incidents 49–56)

Incident 49.—An RFH form dated May 30, 1995, states that employer Atwater wanted a second pressman on a 40-inch, 6-color Miehle (Tr. 526, GC Exh. 9 p. 47). This RFH does not specify a starting date. An RFH form dated June 2, 1995, contains the same request, with a starting date of June 5 (Tr. 526, GC Exh. 9 p. 49, R. Exh. 23 p. 1). Lines drawn through these RFH's shows that these requests were filled (Tr. 518). Second pressman James Vacca, with an out-of-work date later than D'Amico's, was referred to Atwater (R. Exh. 23 p. 2, GC Exh. 11 p. 19, Tr. 569, 842). Composto testified that Vacca was referred to this job on June 5 and his last day of work was June 9 (Tr. 760, 770).²⁵ Composto testified as follows:

Q. And why was Mr. Vacca sent out to Atwater on 6/5/95?

A. They were looking for a second man on the Miehle.

Q. Do you know whether Mr. Vacca could run a Miehle?

A. That's why I sent him. Obviously that's why I sent him.

Q. Is there anything on [Vacca's employment] card [R. Exh. 23] that says one way or the other?

A. I don't see anything here that says—let me just see something here. Let's see if I can find something that helps me. He made out at Litho Art, I know they had a Miehle in there, so that might have been one reason.

The employment office never contacted D'Amico about this job.

Incident 50.—An RFH form dated June 23, 1995, states that Atwater wanted a second pressman on a 40-inch, 6-color Miehle and was requesting Vacca (R. Exh. 15 p. 1). The form indicates that this request had been approved by LoPresti (R. Exh. 15 p. 1). Pursuant to the June 23 RFH, Vacca was put to work by Atwater on June 26 (Tr. 760, GC Exh. 10 p. 33, R. Exh. 15 p. 2, R. Exh. 36). Composto testified that this later referral was a call-back (Tr. 760) (see sec. II, M, 3, b, below). Vacca's out-of-work date was later than D'Amico's (R. Exh. 15 p. 2, GC Exh. 11 p. 19). The employment office never contacted D'Amico about this job.

Incident 51.—The record contains an RFH from employer TFH Lithograph dated June 5, 1995 (GC Exh. 9 p. 50). This RFH was not written by Composto, and he testified (Tr. 526) that he did not understand the specifications written on the RFH. I read the RFH as asking for an operator on a web press, and pursuant to a referral from the employment office, TFH Lithograph in fact put an operator to work on June 19 (GC Exh. 10 p. 32). The RFH also requests a pressman, without specifying a first pressman or a second pressman. As I read the RFH, it requests a pressman on a "4 unit Solma Butless Splicer Sheeter & Folder," and the "Web" entry is directed to the operator. Composto testified, "This press is a very unusual press. . . . It

says [web], here, also. So I guess it's a [web], this press. Over here it says something about sheet-fed and folder." Respondent's brief asserts (p. 17, square 29) that this RFH involved web presses. A line across the RFH shows that it was filled (Tr. 518). Pursuant to referral by the employment office, web second pressman Benjamin Caban began to work for TFH on June 26, and second pressman (web and sheet-fed) Robert Hopkins began to work for TFH on June 27 (R. Exh. 17 p. 2, R. Exh. 49, GC Exh. 8 p. 22, GC Exh. 10 p. 33). Composto testified that Hopkins was "a lot more qualified" than D'Amico. The out-of-work dates of both Caban and Hopkins were later than D'Amico's (GC Exh. 11 pp. 19, 20). The employment office never contacted D'Amico about these vacancies.

Incident 52.—Pursuant to a referral from the employment office, sheet-fed pressman Lawrence R. Jacobson, with a later out-of-work date than D'Amico's, started to work for Crestwood Printing on June 13, 1995 (GC Exh. 8 p. 20, GC Exh. 10 p. 30, Tr. 567–568). The record fails to show whether Crestwood requested a first pressman, a second pressman, or merely a pressman; whether Jacobson was a first pressman or a second pressman; or whether he was referred or hired as a first pressman or as a second pressman. The employment office never contacted D'Amico about this job.

Incident 53.—An RFH form dated June 16, 1995, states that employer Barton wanted a pressman, without stating whether a first pressman or a second pressman was wanted, and without specifying the kind of press (Tr. 526–527, GC Exh. 9 p. 51.) A line across this RFH shows that the job was filled (Tr. 518). Pursuant to a referral from the employment office, pressman Joseph Blankenship started to work for Barton on June 19 (GC Exh. 10 p. 32). The record fails to show whether he was a first or a second pressman. His name appears on the last 1994 employment list, and he had previously started to work for Barton on March 1 and April 4 (see Incident 19, above, sec. II, F), but the record fails to show whether he thereafter worked long enough to acquire a new out-of-work date (GC Exh. 7 p. 2). The employment office never contacted D'Amico about this job.

Incident 54.—An RFH form dated June 21, 1995, states that employer D&L wanted a pressman on a 4-color Heidelberg, without specifying whether a first or a second pressman was wanted (Tr. 527, GC Exh. 9 p. 52). A line across the RFH shows that the job was filled (Tr. 518). Pursuant to a referral from the employment office, sheet-fed pressman Ronald Traina, with a later out-of-work date than D'Amico's, began to work for D&L on June 26, 1995 (R. Exh. 50, R. Exh. 53, GC Exh. 10 p. 33, GC Exh. 11 p. 19). Traina was a first pressman on some presses (including a 4-color Heidelberg) and a second pressman on others (R. Exh. 53, Tr. 795). The record fails to show whether he was referred or hired as a second pressman or as a first pressman (Tr. 829–830). The employment office never contacted D'Amico about this vacancy.

Incident 55.—An RFH form dated June 27, 1995, states that employer Command Web Offset wanted a pressman (without specifying whether a first pressman or a second pressman was wanted) for a Honcho press (GC Exh. 9 p. 55). The Honcho press is a web press (Tr. 793), which D'Amico cannot operate. A line across the RFH shows that this job was filled (Tr. 518).

²⁵ This is not shown by the transaction list on which the employment office records hires pursuant to referrals. The only relevant date of Vacca's hire by Atwater is there recorded as June 12 (GC Exh. 10 p. 30). His employment card (R. Exh. 15 p. 2) states that he worked for Atwater between about June 2 and 9.

The record fails to show whether the pressman probably referred to and hired for this job (Vito Masaracchia) was a first or a second pressman, or whether he was referred or hired as a first or a second pressman, or his out-of-work date (GC Exh. 10 p. 34). The employment office never contacted D'Amico about this job (see sec. II,L and M,3,b,below).

Incident 56.—Pursuant to a referral from the employment office, sheet-fed pressman Arthur Faerber, with a later out-of-work date than D'Amico's, started to work for employer Scott on June 28, 1995 (GC Exh. 10 p. 33, R. Exh. 48). Faerber had left Scott on June 7, 1995 (see Incident 46, sec. II,G,3, above), and Composto testified (Tr. 792) that Faerber was a call-back (see sec. II,M,3,b, below). The RFH which led to this referral is not in the record. Laying to one side the prior Scott RFH, which had successfully requested Faerber by name and had specified a second pressman, the record fails to show whether Faerber was a first or a second pressman, or whether the RFH which led to his rehire requested a first pressman, a second pressman, or merely a pressman. The employment office never contacted D'Amico about this vacancy.

6. July 1995 referrals (Incidents 57–69)

Incident 57.—An RFH form dated June 26, 1995, states that employer Master Eagle wanted a second pressman on a 40-inch, 4-color Heidelberg press, and wanted the referral of John Carbone (Tr. 527, R. Exh. 52, GC Exh. 9 p. 54). Second pressman (sheet fed) Carbone, with a later out-of-work date than D'Amico's, was referred to Master Eagle, which put him to work on July 7 (R. Exh. 52, GC Exh. 10 p. 34, Tr. 821–822). The RFH does not state that Master Eagle's request for Carbone was approved by a union officer, but I infer that it was, because Williams, who probably wrote the RFH, testified that so far as she knew, all employer requests for referral out of order had been approved by union officers before being honored. Master Eagle was Carbone's immediate prior employer, and Composto testified (Tr. 796–797) that he “would say” this was an example of a call-back (see sec. II,M,3,b, below). The employment office did not contact D'Amico about this job.

Incident 58.—An RFH form dated July 5, 1995, states that employer Barton Press wanted a first and a second pressman, without specifying the kind of press (GC Exh. 9 p. 57). A line across the RFH shown that these jobs were filled (Tr. 518). Pursuant to referrals by the employment office, Barton put pressmen Russell Fields and Casimir Fellenberg to work on July 7 (GC Exh. 10 p. 35). Both of them had out-of-work dates later than D'Amico's (GC Exh. 11 p. 25). The record fails to show as to either of them whether he was referred as a second or a first pressman. The employment office did not contact D'Amico about the jobs specified on this RFH.

Incident 59.—An RFH form dated June 30, 1995, states that employer Terwilliger wanted one first pressman and one second pressman on a Harris press (GC Exh. 9 p. 56) (see fn. 27, below). The form states that a request by Terwilliger for pressman Traina had been disapproved by LoPresti and “me too.” A line across the RFH shows that these jobs were filled (Tr. 518). Pursuant to referrals by the employment office, Albert Castagnetta and Armando Bilancione began to work for Terwilliger on July 10 (GC Exh. 10 p. 36, R. Exh. 45, R. Exh. 54, R. Exh. 55,

R. Exh. 60, Tr. 783–784, 798–799). Castagnetta was referred as a first pressman (R. Exh. 54). The employment card to which Bilancione's work slip for this job was attached states that he is a second pressman, sheet fed (R. Exh. 55)²⁶. Both Bilancione and Castagnetta had out-of-work dates later than D'Amico's (R. Exhs. 45 and 55, GC Exh. 11 p. 23). The employment office did not contact D'Amico about the jobs specified on this RFH.²⁷

Incident 60.—An RFH dated July 6, 1995, states that employer Herst Litho wanted for an unspecified kind of Heidelberg a day-shift second pressman and a night-shift second pressman (GC Exh. 9 p. 58, R. Exh. 27 p. 1). A line through this RFH shows that both jobs were filled (Tr. 518). The employment office referred pressman Louis Chiacchiaro pursuant to this RFH, and also referred pressman Ronald Traina, both of them with out-of-work dates later than D'Amico's (R. Exh. 27 p. 2, R. Exh. 53, Tr. 531–532, 773, 821). Both of them started to work for Herst on July 10 (GC Exh. 10 p. 36). The employment office did not contact D'Amico as to either of these vacancies.

Incident 61.—Employer Milo requested a pressman to start work on July 10, 1995 (R. Exh. 56, Tr. 817–818). Pressman Paul Kovacs, with an out-of-work date later than D'Amico's, was referred to and hired for that job (R. Exh. 56, Tr. 572, 815–817). The relevant RFH is not in the record, and the record fails to show whether Milo asked for a first pressman, a second pressman, or merely a pressman; the kind of press involved; or whether Kovacs was referred or hired as a first or as a second pressman. On the basis of a July 6 notation on his employment card that someone else had referred him to another employer, who did not hire him because he was “not strong enough for first man Heidi,” Composto testified that “obviously,” Kovacs was a first pressman (Tr. 799–800). See Incident 26, above. The employment office did not contact D'Amico with respect to this vacancy.

Incident 62.—As testimonially explained by Composto, an RFH form dated July 10, 1995, states that Litho Art wanted a pressman who could act as a second pressman on a manual Miehle and as a first pressman on a Harris (GC Exh. 9 p. 59, Tr. 532). Pursuant to a referral by the employment office, Litho Art put pressman Victor J. Romeo to work on July 18 (GC Exh. 10 p. 37). His out-of-work date was later than D'Amico's (GC

²⁶ Composto initially testified that he believed Bilancione was a first pressman (Tr. 783–784). Immediately thereafter, Composto testified (Tr. 784) that Bilancione was a first pressman on some presses and a second pressman on others. Later, Composto testified (Tr. 798–799) that Bilancione “was a man that was a second pressman, sheet fed. I believe he was also a first pressman but he preferred to go out as a second pressman.” Two of his employment cards received into evidence state that he is a second pressman (R. Exh. 55, R. Exh. 60), and another contains no specification (R. Exh. 38).

²⁷ After inspecting the RFH for this job, Composto testified (Tr. 527) that “It looks like it says first and second Harris . . . Maybe a man that could act either as a first or second [pressman].” Because Terwilliger put two pressmen to work on the same day, and because one of them was referred as a second pressman and the other as a first pressman, I read the RFH as requesting a first pressman and a second pressman.

Exh. 11 p. 26). The employment office did not contact D'Amico with respect to this vacancy.

Incident 63.—As testimonially interpreted by Composto, an RFH form dated July 11, 1995, states that employer Scott Press wanted “immediately” a pressman who was willing to act as a first pressman or as a second pressman on a 2-color Heidelberg Speedmaster, and also wanted a web pressman (GC Exh. 9 p. 60, Tr. 532). A line through the RFH shows that these jobs were filled (Tr. 518). Pursuant to referrals by the employment office, Scott put pressman Michael J. Callanan, with a later out-of-work date than D'Amico's, to work on July 18 (GC Exh. 10 p. 37, GC Exh. 11 p. 26). The employment office did not contact D'Amico about these jobs.

Incident 64.—An RFH form dated July 17, 1995, states that on July 24 employer Scott Press wanted a second pressman on a sheet-fed Heidelberg (GC Exh. 9 p. 61, R. Exh. 24 p. 1). Pursuant to a referral by the employment office, first pressman Louis J. Castrovinci, with an out-of-work date later than D'Amico's, started to work for Scott on July 24, 1995 (Tr. 771–772, 775, 560–561, R. Exh. 24 p. 2, GC Exh. 10 p. 38, GC Exh. 11 p. 9). The employment office did not contact D'Amico with respect to this vacancy.

Incident 65.—An RFH dated July 18, 1995, states that Arkay Packaging wanted “ASAP” 3 interviews for a job as a second pressman on a 6-color Heidelberg (Tr. 534, GC Exh. 9 p. 62). A line through the RFH form shows that this vacancy was filled (Tr. 518), but the record fails to show who were referred to the job, when it was filled, or by which employee. The employment office's transaction list for the week ending August 2 is missing from the Union's files (R. Exh. 13, Tr. 934). The employment office did not contact D'Amico with respect to this vacancy.

Incident 66.—An RFH form dated July 20, 1995, states that employer Command Web Offset wanted a pressman (without specifying a first or a second pressman) on a kind of press whose name on the form is almost illegible but which may be a Honcho (a web press) (Tr. 534, GC Exh. 9 p. 63). A line through this form shows that the job was filled (Tr. 518). Pursuant to a referral by the employment office, Command put sheet-fed and web second pressman Ernesto Rivera, with an earlier out-of-work date than D'Amico's, to work on July 25 (GC Exh. 8 p. 24, GC Exh. 10 p. 38). The employment office did not contact D'Amico with respect to this vacancy.

Incident 67.—An RFH dated July 24, 1995, states that employer Bengal wanted a first pressman on a four-color Heidelberg (R. Exh. 33, p. 1). Pursuant to this RFH, the employment office referred second pressman Wayne H. Wink, whom Bengal put to work as a first pressman on July 25 (GC Exh. 10 p. 38, R. Exh. 33 p. 2, Tr. 777–778). Composto testified, in effect, that when a first pressman had been requested but none was available, Composto would contact the second pressman with the earliest out-of-work date and refer him if he said that he could handle the job (Tr. 961–962). Wink's work slip suggests that his referral was approved by union director of organizing Calderone (R. Exh. 33 p. 2). Wink's out-of-work date was later than D'Amico's (R. Exh. 33 p. 2). Wink's employment card states that he can operate a Heidelberg without a console (R. Exh. 33 p. 2). Composto testified, in effect, that the press involved in the referral was a Heidelberg with a console

(Tr. 844). The employment office did not contact D'Amico about this job.

Incident 68.—An RFH dated July 26, 1995, states that employer Terwilliger wanted a second pressman on a 6-color Komori (Tr. 534, GC Exh. 9 p. 65). A line through this RFH shows that this job was filled (Tr. 518). Pursuant to referral by the employment office, Terwilliger put pressman Joseph Blankenship, with a later out-of-work date than D'Amico's, to work on July 31 (Tr. 579, GC Exh. 10 p. 40, GC Exh. 11 p. 30). The employment office did not contact D'Amico about this job.

Incident 69.—An RFH dated July 26, 1995, states that employer Pace Press wanted two second pressman on a Heidelberg, to start on July 31 (GC Exh. 9 p. 66). A line through the RFH shows that these jobs were filled (Tr. 518). Pursuant to referral by the employment office, pressmen Victor Romeo and James K. Smith were put to work by Pace on July 31 (GC Exh. 10 p. 40). Both of them had later out-of-work dates than D'Amico's (GC Exh. 11 pp. 26, 27, 29). The employment office did not contact D'Amico about these jobs.

H. The D&L Litho/Terwilliger Incidents

The shops which use the employment office include a shop called D&L Offset Litho Co., and another shop called D&L Terwilliger. Composto testified (without objection, limitation, direct corroboration, or direct contradiction) that at some time before 10 a.m. on Friday, July 21, “somebody” from “Terwilliger” telephoned union president LoPresti and said that “Terwilliger” absolutely had to have a crew for Monday morning, July 24. Thereafter, LoPresti relayed this message to Composto, and told him to have somebody there on Monday. An RFH dated July 21, 1995, states that “Terwilliger” required a first and a second pressman (as well as an operator) on a 4-color Harris press (GC Exh. 9 p. 64, Tr. 534). Within a half hour after receiving LoPresti's call, Composto telephoned D'Amico at his home. Nobody answered the telephone, and Composto left a message on D'Amico's answering machine about a job. A notation by Composto on D'Amico's new-style employment card states, “7–21–95 Terwilliger Recorder.”

D'Amico did not receive Composto's message until 5 p.m. on July 21. D'Amico immediately telephoned the employment office, but Composto was not there (Tr. 116). D'Amico again called the employment office at 8 a.m. on Monday, July 24, but nobody answered the telephone. At 8:30 a.m., he again called the employment office. He reached Composto, who told him that Composto had had two jobs as pressmen at “D&L” on a 4-color Harris press, but that these jobs started on that same Monday, Composto had had to get someone else to fill them, and D'Amico had called too late. As previously noted, the RFH specifies one first pressman and one second pressman. D'Amico's new-style employment card contains the notation “7–24–95 called too late for job.” D'Amico told Composto that he could send D'Amico out as a second pressman on any press, that D'Amico had worked on Harris and Miehle presses, but that Composto should call him as a second pressman on presses he had never worked, including Komoris. There is no evidence that the employment office referred anyone to D&L Offset at any material time. The employment office's transaction list states that pressman Ernest L. Smalls, as well as an operator

(Kenneth Taclay), started to work for Terwilliger on Tuesday, July 25, the day after this conversation between D'Amico and Composto (GC Exh. 10 p. 38).²⁸ These July 24–25, 1995 jobs were the first jobs as to which the employment office had contacted D'Amico since he had registered with that office on December 30, 1994.²⁹

1. The MacNaughton Incident

For about 20 years before becoming employment director, D'Amico had worked for MacNaughton. At the time D'Amico lost the 1994 union election, MacNaughton's plant superintendent was Stephen Rickett, who had worked with D'Amico at MacNaughton for a number of years. After D'Amico's term as union vice president expired at the end of 1994, Rickett gave him some assistance (which proved to be unavailing) in seeking work related to but outside the lithographic trade. About late July 1995 (see fn. 33, below), when D'Amico told Rickett that D'Amico was still out of work, Rickett said that if D'Amico wanted to come back to MacNaughton, Rickett would find a spot for him.

At all times relevant here, including the period when D'Amico was working for MacNaughton, MacNaughton's equipment included a 77-inch sheet-fed, fully manual Harris press and a 78-inch sheet-fed, fully manual Harris press. For purposes relevant here, the two presses (which print posters and other display materials) are identical; each of them will be referred to herein as a large sheet-fed manual Harris press. D'Amico testified that during the 8 or 9 years he was working for MacNaughton as a pressman, he had spent about 65 percent of his time on such presses. During the period relevant here, very few shops in the area operated large sheet-fed manual Harris presses, and very few employees had worked or been trained on this type of press. From time to time, MacNaughton requested the employment office either to refer employees with experience on this type of press, or to refer employees whom MacNaughton identified by name and who had such experience. Although the employment office complied with the by-name requests and attempted to obtain employees with such

experience, MacNaughton had been having difficulty for 8 or 10 years in obtaining from the employment office any press employees with experience on this type of press, and had frequently been manning it by transferring its own incumbent employees from other presses and giving them on-the-job training on the large sheet-fed manual Harris press. Rickett, who had been MacNaughton's plant superintendent for 15 or 16 years and had previously worked for MacNaughton as a rank-and-file employee, credibly testified to the opinion that operating such presses takes more hands-on skill than operating smaller presses, most of which are operated by a computer referred to in the record and herein as a console.

At the time of Rickett's conversation with D'Amico about a job, MacNaughton had just used personnel from another press crew in order to reactivate a large sheet-fed manual Harris press, which had been shut down for a brief period. In the expectation that this Harris press would operate on a two-shift (or, perhaps, three-shift) basis for a week or two, MacNaughton had completely manned all but the night-shift crew for this press (a complete crew for a single shift consisted of a first pressman, a second pressman, a first operator, and a second operator), but did not have a first operator for the night shift. After conversing with D'Amico about a job with MacNaughton, Rickett told MacNaughton Pressman Foreman John Tyrrell that D'Amico as out of work, and that MacNaughton needed an operator. Rickett said that he knew D'Amico was a pressman, but that when Tyrrell got a chance he should "call the Union" and see if he could get D'Amico as an operator on the large sheet-fed manual Harris press.

Tyrrell thereupon telephoned Composto that MacNaughton needed an operator on a large sheet-fed manual Harris press, and said that D'Amico was out of work. Tyrrell said that MacNaughton realized D'Amico was a pressman, but that MacNaughton was going to hire him and use him as an operator. Composto said that he would see what he could do. He offered to send MacNaughton somebody else; Tyrrell said that he would get back to Composto. At about the same time, Tony Mortillo, the union delegate at MacNaughton, told Composto that MacNaughton wanted D'Amico for an operator's job.³⁰ Composto told Mortillo that Composto did not think he could do that without a union officer's approval.

After this Tyrrell-Composto conversation, D'Amico telephoned Rickett and asked whether MacNaughton had called for D'Amico. Upon Rickett's ensuing inquiry, Tyrrell again telephoned the employment office about referring D'Amico. Com-

²⁸ The employment transaction lists state that pursuant to a referral by the employment office, pressman Frank A. Del was put to work for Terwilliger on Monday, July 24 (GC Exh. 10 p. 38). Neither Smalls' nor Del's name appears on the last 1994 employment list, but the record otherwise fails to show their out-of-work dates.

²⁹ This finding is based on D'Amico's testimony. Williams testified that when operating the employment office, she contacted D'Amico about a job on a Heidelberg and he said that he did not know it. As to the date of this alleged contact, she testified that it occurred while the employment office was still using his old-style card, which according to Composto was replaced in about early April 1995. Because Williams was uncertain as to the specifics of this alleged contact, and after considering the witnesses' demeanor, I credit D'Amico. If credited, Williams' testimony in this respect would corroborate D'Amico's and Rotoli's testimony that D'Amico's original card stated that he could act as a second man on all presses, and would conflict with Composto's testimony that it specified only Harris presses, in view of Williams' testimony, in effect, that when deciding whom to contact on the basis of an RFH specifying a particular press, she would contact only an employee whose card claimed ability to operate that press, either specifically or by means of a claim that he could operate "all presses" (see sec. II,M,3,c, below).

³⁰ Composto testified that Mortillo, who did not testify, had said that MacNaughton wanted D'Amico as an operator on a washup crew. Composto and Curto both testified that the wash-up crew matter was raised during their subsequent discussion of MacNaughton's request for D'Amico. Because Tyrrell credibly denied having requested anyone for a washup crew, in the absence of corroboration by Mortillo, and for demeanor reasons, I find that Mortillo did not make such a representation and that Composto never made such a claim to Curto. In any event, Tyrrell's testimony is undenied that he told Composto that MacNaughton wanted to assign D'Amico to a large sheet-fed manual Harris press, and Respondent does not appear to contend that Composto's action with respect to D'Amico was related to any proposed placement of him on a washup crew.

posto said that he could not refer a pressman to an operator's job because a lot of operators were out of work. Tyrrell asked whether MacNaughton could have D'Amico if it was willing to pay him a pressman's rate of pay. MacNaughton had previously assigned to operators' jobs employees who had been hired as pressmen on the large sheet-fed manual Harris presses, and paid such employees at pressman's rates, in order to retain them on the payroll as potential pressmen on such presses; and the Union had never objected to this practice. Furthermore, on at least three occasions, MacNaughton had hired individuals (none of them pressmen) at the request of, and referred by, the employment office for jobs in classifications lower than those such individuals normally held. However, Composto testified that so far as he knew, a pressman had never been okayed to go to work as an operator.³¹ In response to Tyrrell's inquiry, Composto said that putting D'Amico to work as an operator at pressman's pay would have to be okayed by a union officer, and that there was a further problem because other pressmen were ahead of D'Amico on the pressmen's list. Composto asked Tyrrell if he wanted Composto to send somebody else; Tyrrell said no.

Then, Composto told Curto that MacNaughton had offered to pay D'Amico pressman's pay to do an operator's job. Curto said that referring D'Amico would still not be fair, because some pressmen were ahead of D'Amico and, in any event, some operators had been out of work a long time and were off benefits.³² As previously found, on various dates in late July, the employment office had referred about 4 second pressmen with later out-of-work dates than D'Amico's. See section II,G,6, above, Incidents 67, 68, and 69. In July 1996, and again in the fall of 1996, Curto approved requests from employer Amdima to refer Andrew Ruggiero as a first pressman when others had earlier out-of-work dates than he, because he was able to operate an "antiquated press" used by Amdima and very few pressmen were able to operate it (Tr. 910-912, R. Exh. 10, R. Exh. 16, GC Exh. 10 p. 37, GC Exh. 11 p. 11).

About August 2, D'Amico telephoned Rickett, and then Tyrrell, about D'Amico's prospects for a job with MacNaughton. D'Amico credibly testified, without objection or limitation, that Tyrrell told him that LoPresti had told Rickett that pressmen with earlier out-of-work dates than D'Amico's were unemployed. On August 3, 1995, D'Amico signed the charge which gave rise to the case at bar.³³

³¹ See, however, Incident 76, below sec. II,J, where in mid-August 1995, with Curto's approval, the employment office responded to employer Pace's RFH for a second pressman, with a request for a named employee, by referring that employee, who was put to work as an operator.

³² The employment list suggests that D'Amico had exhausted his benefits as of the week ending July 21 (GC Exh. 11 p. 28). Moreover, Composto testified that he knew as of August 17 that D'Amico was probably out of benefits. However, Curto testified that his decision would have been the same if D'Amico no longer had benefits.

³³ This charge alleges, inter alia, that the Union unlawfully caused "employers to discriminate against employees," and identified MacNaughton "and various other employers" as the employers involved. Because this charge names MacNaughton, because the record reveals no other MacNaughton—D'Amico contacts involving a job with MacNaughton, because of D'Amico's credible testimony that it

When union counsel asked Composto why "the Local" would not send a pressman to do an operator's job, Composto replied, "in the press department, the most serious situation for jobs is operators . . . there are many more pressmen jobs offered. Operators is the slowest moving list. We just wouldn't take a pressman off the pressmen list and give him an operator's job. It just wouldn't be the right thing to do. You know, when I got a job for an operator it was like, it was good to get a guy out there working off that list."

MacNaughton hires all of its nonsupervisory press employees pursuant to referrals from the employment office. After MacNaughton realized that D'Amico would not be referred, Tyrrell advised the Union that MacNaughton did not need an operator. There is no claim or evidence that any pressman (except D'Amico) or operator on the employment list had experience on the large, sheet-fed manual Harris press, or that the employment office tried to find such an employee on that list.

After these events in July and early August 1995, MacNaughton hired pressmen through the employment office without requesting D'Amico by name. Rickett credibly testified that MacNaughton stopped asking for D'Amico by name because Rickett understood D'Amico was satisfied with a job he had obtained (not in the lithographic trade) in the meanwhile.

Rickett credibly testified that on numerous occasions during his 16 years as plant superintendent, MacNaughton had requested the employment office to refer former MacNaughton employees whom MacNaughton had identified by name, and that so far as he could recall, such requests had been refused only when the requested employee was already working elsewhere and as to D'Amico. As to the employees whom MacNaughton had so requested because of their experience on the large manually operated Harris press, their break in employment with MacNaughton had lasted up to two or three years. All of the five individuals whom Rickett identified by name were pressmen, and at least four of them were brought back as pressmen and not operators. Rickett credibly testified that in the MacNaughton shop, pressmen are not traditionally brought back as operators.

Composto testified that between January 1995 and February 1996 he referred people for pressmen positions whose out-of-work date was later than D'Amico's, and that one reason "would be" that "they might be requesting somebody for a specialty. Or maybe, for some reason or other, an officer might okay somebody being referred for a job." As previously noted, on two occasions in 1996 Curto approved requests to refer Andrew Ruggiero as a first pressman when others had earlier out-of-work dates than he, because he was able to operate an "antiquated press" which very few pressmen were able to operate.

was this incident which prompted him to file the charge, because D'Amico testimonially dated Composto's "refusal" to refer him to MacNaughton as early August, and because a prehearing affidavit by D'Amico attaches early August 1995 dates to his conversations with Rickett and Tyrrell, I find that the events involved in the MacNaughton incident occurred in early August 1995. I believe that Composto and Curto were mistaken in dating these events as March and/or early April 1995; I note that Tyrrell was uncertain as to the year of these events, and Rickett testified that they occurred between late February and "It could've been May for all I know."

The May 1995 referral of Arthur Commisso to Sanford Graphics is explained by Respondent as at least partly due to the fact that he had been requested by name (Br. p. 16 square 20). The June 21, 1995, referral of Paul Maino to Pictorial Offset is explained by Respondent as at least partly due to the fact that he had been requested by name (Br. p. 17, square 26). An RFH dated March 21, 1995, from American Direct Printing, requesting the referral of either Tony Wetzel or Andrew Ruggiero, was honored as to Ruggiero with Curto's approval (Tr. 753, R. Exh. 10, GC Exh. 10 p. 18 ("Amdima Lithographing")). An RFH dated March 28, 1995, from Scott Press, requesting the referral of pressmen William A. Ratz and Ronald R. Sottile, was honored as to both of them, apparently with the approval of someone whose identity is not clear in the record (GC Exh. 10 p. 19, R. Exh. 11, R. Exh. 12, Tr. 754-756). As previously noted, the record shows that other employer requests for a particular individual were sometimes approved by Curto or another union officer (Incidents 29, 50, 57, above). On occasion, while D'Amico was employment director, he had asked MacNaughton to request particular employees by name (because, for example, the employee was about to lose his benefits) and, when MacNaughton made such a request, had referred the requested employee. Williams testified that she had received very few employer requests for referral of individuals out of order, but so far as she knew, all of these requests had been approved by union officers.

However, as previously noted, some RFH forms indicate that the employer's request for a particular individual or individuals was rejected, usually because of disapproval by Curto or another union officer (Incidents 25, 27, 34, 44, and 59, above). All of these jobs were filled by other employees referred by the employment office. The employment office did not prepare an RFH form for an operator or a pressman in connection with MacNaughton; Composto testimonially explained that "there never was a request." Although Composto testified that during his first conversation about MacNaughton's request for D'Amico, Mortillo told him that MacNaughton also wanted a tender (apparently as part of the allegedly requested wash-up crew), there is no evidence that the employment office ever prepared a MacNaughton RFH for a tender.

*J. Referral Action in August and September 1995
(Incidents 70-77)*

Incident 70.—An RFH dated July 31, 1995, states that employer Scott Press wanted a second pressman on a Heidelberg, and 2 pressmen on a V-15 (a web press), to start on August 7 (Tr. 534, 755, GC Exh. 9 p. 67). A line through the RFH shows that these jobs were filled (Tr. 518). Pursuant to referrals from the employment office, pressman Armando Bilancione, second pressman William A. Ratz, and pressman Ronald Sottile were put to work by Scott on August 7 (GC Exh. 10, pp. 41, 42, R. Exh. 55). All three of them had later out-of-work dates than D'Amico's (GC Exh. 11 pp. 30, 32). Bilancione was referred as a sheet-fed second pressman; Ratz and Sottile had experience on both web and sheet-fed presses (R. Exh. 11 p. 3, R. Exh. 12, R. Exh. 55). The employment office did not contact D'Amico in connection with this RFH.

Incident 71.—An RFH dated August 2, 1995, states that employer Arkay wanted a second pressman on a Heidelberg (GC Exh. 9 p. 68, Tr. 535). A line through the RFH shows that this job was filled, but the record fails to show when or by what employee. The employment office did not contact D'Amico about this job.

Incident 72.—As testimonially interpreted by Composto, an RFH dated August 3, 1995, states that employer Terwilliger wanted a second pressman for a 6-color Komori, and a first and a second pressman for a 4-color Harris, to start August 7 (GC Exh. 9 p. 69, Tr. 535). A line through the RFH shows that these jobs were filled (Tr. 518). Pursuant to referrals from the employment office, Louis Chiacchiaro and Robert Lepore were put to work by Terwilliger on August 7 (GC Exh. 10 p. 42, R. Exh. 59, R. Exh. 63). Lepore was a first pressman (sheet fed); Chiacchiaro was referred to this job as a first pressman (R. Exh. 59, 63). Both of them had later out-of-work dates than D'Amico's (GC Exh. 11 p. 32, Tr. 578). The employment office did not contact D'Amico about these jobs.

Incident 73.—As testimonially interpreted by Composto, an RFH dated August 4, 1995, states that employer Sanford Graphics wanted a second pressman, on August 7, who could operate both a Heidelberg and a Harris press (Tr. 535, 842-843, 780-783, R. Exh. 35 p. 1, GC Exh. 9 p. 71). The employee referred to and hired for that job was James Vacca, a second pressman on sheet-fed presses, whose out-of-work date was later than D'Amico's (R. Exh. 35 p. 2, R. Exh. 36, GC Exh. 10 p. 41, GC Exh. 11 p. 31, Tr. 569, 780).³⁴ When asked why Vacca was sent to that job, Composto testified (Tr. 780) that "there is a request for . . . Heidelberg and he is a Heidelberg man and I would assume that's why." Unlike D'Amico's employment card, Vacca's employment card (R. Exh. 35 p. 2) does not claim that he could operate a Harris press. The employment office never contacted D'Amico about this job.

Incident 74.—Armando Bilancione was referred to employer Scott for a job on a sheet-fed Heidelberg press to begin on August 7, 1995 (R. Exh. 60, Tr. 803, 811-812). Scott put him to work on that date (GC Exh. 10 p. 41). Bilancione's employment card and work slip for this job state that he is a second pressman on sheet-fed presses (R. Exh. 60). His out-of-work date was later than D'Amico's (R. Exh. 60). Bilancione had experience on Harris, Komori, Heidelberg, and Miehle presses (Tr. 798-799). The employment office did not contact D'Amico about this job.

Incident 75.—An RFH from employer Scott dated August 8, 1995, requests (inter alia) a first pressman and a second pressman on a 6-color Heidelberg press with a console, and a first pressman on a web press (R. Exh. 17 p. 1, GC Exh. 9 p. 72, Tr. 535, 761-763). In response to this RFH, the employment office referred pressman John Costiera (a first and second pressman) as a pressman on the web press, and pressman Robert Hopkins (with an out-of-work date later than D'Amico's) as a second pressman on the Heidelberg press (R. Exh. 17 pp. 2-3, GC Exh.

³⁴ I can find no evidence in the record to support the assertion in Respondent's brief (p. 19 square 45) that Vacca was a "recall." His employment card (R. Exh. 35 p. 2) states that his most recent employer was Atwater.

11 p. 10, Tr. 570–571, 761–763). Both of them began to work for Scott on August 9 (GC Exh. 10 pp. 42–43, Tr. 577). For the first pressman's vacancy on the Heidelberg, the employment office referred an unidentified employee who had experience on a Heidelberg. Scott refused to hire him because the Heidelberg on which he had experience was newer than the one Scott had. The employment office had no other pressman with Heidelberg experience. At Scott's request and with Curto's approval, Scott upgraded an operator with the understanding that he would be temporarily upgraded until Scott had finished the work it was doing or the employment office could get another Heidelberg man, as it never did get. The employment office never contacted D'Amico about a job with Scott. Hopkins' employment card states that he had Heidelberg experience (R. Exh. 17 p. 2). Composto testified that D'Amico was not referred for that job because, so far as Composto knew, D'Amico had no Heidelberg experience,³⁵ and Scott was unwilling to take a man (namely, a first pressman) with Heidelberg experience simply because he did not know the feeder, "So, what was the point in wasting everybody's time in sending Richard D'Amico on the job?" Because all three of these referrals were made in response to the same August 8 RFH, and because referred second pressman Hopkins (as well as referred web first pressman Costiera) started to work on August 9, I infer that the employment office referred Hopkins before Scott rejected the employee referred as a first pressman on the Heidelberg.

The employment office's paperwork in connection with the August 8 RFH indicates that the regular union delegate at Scott, Brian Daly, was then on vacation and that his responsibilities as delegate were being discharged by an assistant delegate, John Falatovitch (GC Exh. 9 p. 72, R. Exh. 17). D'Amico credibly testified (without objection, limitation, or contradiction) that on August 17, Daly advised him by telephone that while Daly was on vacation, Falatovitch had received permission from Composto to upgrade an operator to a pressman. Under the employment office procedure which had been followed by D'Amico when he was employment director, an employer was not allowed to upgrade an incumbent employee unless the job to which the incumbent was upgraded could not be filled through the employment office.³⁶ On August 17, D'Amico telephoned Composto. D'Amico asked where he was on the employment list; Composto gave a number in the 40s (it was in fact 47).³⁷ D'Amico asked whether there were any jobs,

whether there were any jobs in New Jersey (where D'Amico lived and the Scott shop is located), whether there were any permanent jobs, and whether there were any day jobs. Further, D'Amico asked why he had not been called by the employment office. Composto replied that things at the employment office were hectic, and that D'Amico as employment director had not treated Composto right when he was unemployed.³⁸ He said that there were jobs in New Jersey and elsewhere, but that it was "tough" to get D'Amico a job because he could run only a Harris press. D'Amico said that he had told Composto a month earlier that D'Amico could go out on any press as a second man (see sec. II.H, above). Composto replied that he did not remember D'Amico's saying that. Composto asked whether D'Amico could run web presses. D'Amico replied no, but that he wanted Composto to put him down for all sheet-fed presses. Notations in Composto's handwriting on D'Amico's new-style employment card state, "All S/F Presses," and "8–17–95 Call Me Requested he be called for all S-F Jobs". Composto testified that he made these notations on the same day as this conversation with D'Amico.

On August 18, Composto telephoned D'Amico and said that Composto had a temporary job for him at "Terwilliger". When D'Amico asked about the job, Composto replied that it was the same job Composto had mentioned to D'Amico the previous month. Composto said that it was not, that in July Composto had told him the job was with D&L (see sec. II.H, above). Then, D'Amico asked for information about the Terwilliger job. Composto replied that the job was a temporary job as a second man on a four-color Harris. D'Amico thereupon telephoned Terwilliger foreman Tommy Scaglione and told him that "the Union" had offered D'Amico a job as the second man on a 4-color Harris. Scaglione said that Terwilliger did not have a 4-color Harris,³⁹ that the job was a temporary job as a second man on a six-color Komori, that Terwilliger was on 12-hour shifts, and that Scaglione would like someone who knew the press. D'Amico said that he wanted Scaglione to know "up front" that D'Amico had not been on a press for 7 years and would probably need help on the Komori, but that he would

³⁵ "To my knowledge MacNaughton had no Heidelberg presses and that's where [D'Amico] came from. So, I didn't know if he had Heidelberg experience or not. I really didn't believe he had Heidelberg experience. . . . I don't know where he got it from if he did . . . everything that I knew was that he ran a Harris and that's all that he ran."

³⁶ Under the heading "Emergency Under-Complement on Presses" (the single employer agreement, R. Exh. 4, sec. 22, pp. 18–19) or "Operating Presses Under Complement" (the MLA agreement, R. Exh. 5, sec. 24, pp. 19–20), if a one-employee vacancy in the contractually required complement on a press cannot be filled, the press can nonetheless be operated if the contractually required complement exceeds two employees, but "the vacancy shall be deemed to be the lowest-rated job on the press and the remaining employees shall be paid the scales of the higher-rated jobs accordingly."

³⁷ This was also Richard E. D'Amico's number during the week ending August 4, 1995, when at least 92 employees were on the employ-

ment list (GC Exh. 11, pp. 31–32). Between August 7 and 16, the following employees with higher numbers than his on the August 4 employment list started to work on jobs obtained through the employment office: second pressman Armand Bilancione (No. 82) (GC Exh. 10, p. 41, R. Exh. 60, , Incident 70); second pressman James Vacca (No. 48) (R. Exh. 35, R. Exh. 36, GC Exh. 10, p. 41, above, Incident 73), and first and second pressman Louis Chiacchiaro (No. 84) (R. Exh. 63, GC Exh. 10, p. 42, above, Incident 72). This list is inserted only to put the significance of D'Amico's number into perspective, and is not intended to be exhaustive.

³⁸ My finding as to Composto's statement about D'Amico's treatment of him is based on the testimony of D'Amico, who testimonially characterized this statement as "something strange that today I don't understand what he meant by it." Composto testified that as employment director, D'Amico had referred Composto to the best job he ever had, and denied making this statement. For demeanor reasons, I credit D'Amico.

³⁹ However, the record contains RFH forms with respect to 4-color Harris presses at Terwilliger on March 16 and July 26 (GC Exh. 9, pp. 27, 65). When asked whether Terwilliger had a Harris press in July 1995, Composto replied that he thought so but was not sure.

definitely take the job. However, D'Amico said, he wanted to find out what the job entailed, and asked whether his job was going to involve lowering the press and feeding the sheets. Scaglione said no, that there was an operator on the press. D'Amico asked who the operator was, and Scaglione replied that it was Jimmy Seaman. D'Amico said that he did not know what was going on, but that there was no way he was going to work with Seaman; that he had been going around and saying that D'Amico had sold him down the river; and that because of what had happened to them in the past (see sec. II,C, above), D'Amico would get no help from him and would just get himself sick. Scaglione told him not to take the job if it was going to get him sick. Scaglione further said that Terwilliger was on a 12-hour shift 6 days a week, that he had to get the work out, and that if D'Amico's acceptance of the job was going to cause a "hassle," Scaglione would rather that D'Amico not take it. Scaglione said that if something came in on another press, D'Amico should "by all means" come in and take the job.

D'Amico thereupon telephoned Composto that D'Amico was not taking the job because of what had happened between him and Seaman.⁴⁰ Composto testified that at the time of this conversation with D'Amico, Composto did not know that Seaman worked at Terwilliger, nor about any relationship between Seaman and D'Amico.⁴¹ Composto inserted an entry on D'Amico's new-style employment card that in stating that he did not want to be referred to this job with Terwilliger, D'Amico said that he could not be "on same press (Komori) with Jimmy Seaman". When asked why Composto had contacted D'Amico about a Komori job in view of Composto's testimony that "everything I knew was that [D'Amico] ran a Harris and that's all that he ran," Composto testified, "I referred him for what I understood to be two jobs. One of them I thought was a Harris, I didn't know what the second press was . . . when [D'Amico] spoke to me [he] mentioned that it was Komori and that's when I wrote it down". Pursuant to referrals by the employment office, pressmen Joseph Currao, with an earlier out-of-work date than D'Amico's, and Louis Chiacchiaro, with a later out-of-work date than D'Amico's, were put to work by Terwilliger on August 21 (GC Exh. 8 p. 29, GC Exh. 10 p. 46, R. Exh. 58). Terwilliger was Chiacchiaro's most recent employer, and Composto testified that Chiacchiaro was a "call-back" (Tr. 801-802, R. Exh. 58, 63) (see sec. II,M, 3, above). Chiacchiaro was referred to this job as a first pressman (R. Exh. 58). Although describing his qualifications as first pressman or second pressman on other presses, his employment card says nothing about his qualifications on Harris or Komori

presses. The record fails to show whether Currao was a first or a second pressman.

Incident 76.—As testimonially interpreted by Composto, an RFH form dated August 11, 1995, states that employer Pace wanted a pressman (without specifying a first pressman or a second pressman) on a press, simply described as a Heidelberg, to start on August 14 (Tr. 535, GC Exh. 9 p. 73). Apparently at Pace's request, employee Robert Purdy was referred to Pace, with Curto's approval, and went to work for Pace as an operator on August 14 (GC Exh. 9, p. 73, GC Exh. 10 p. 44). Laying to one side the evidence that this RFH requested a pressman and Purdy was hired as an operator, the record fails to show his classification on his employment card (cf. supra fn. 31). The record fails to show Purdy's out-of-work date. The employment office did not contact D'Amico about this job.

Incident 77.—The last RFH in the record is dated September 4, 1995, and states that employer Crestwood wanted a second pressman on a 6-color Miehle that evening (GC Exh. 9 p. 74). A line through the RFH shows that the job was filled (Tr. 518), but the record fails to show when or by what employee. The employment office did not contact D'Amico about this job.

K. The August 22-23 Zuckerman Incident and Subsequent Events

At about 2:40 p.m. on August 22, Composto called D'Amico about a request by employer Zuckerman, a Manhattan shop, for a referral as a second pressman on a Heidelberg press to start at 3:30 p.m. that same day. If this job had been accepted by D'Amico (who lives in Pequannock, New Jersey), and assuming the absence of traffic congestion, it would have taken him about 45 minutes after receiving Composto's call to reach Zuckerman's shop. After ascertaining from Composto or Zuckerman that the duration of the Zuckerman job was 1 night, D'Amico advised Composto that D'Amico was annoyed, and that because the job was for only 1 night, D'Amico was not going to take it. D'Amico testified that he would not have accepted the August 22 offer of a 1-day job even if D'Amico had received Composto's call early enough to enable D'Amico to report to the Zuckerman shop on time.⁴²

On the following morning, Zuckerman telephoned Composto and asked why he had not sent anyone over. Composto replied that Zuckerman had only needed someone for one night and Composto had not been able to get anyone to send. Zuckerman replied that although the job was temporary, it would continue for an indefinite period of time. Composto thereupon called

⁴⁰ My findings as to the content of this D'Amico-Composto conversation are based on D'Amico's testimony. I do not credit Composto's testimony, consistent with his entry on D'Amico's new-style employment card, that D'Amico told him that D'Amico could not take the job because it was on heavy board, which is harder to work with. On the press in question, the board was handled by an operator and not by a pressman.

⁴¹ However, Composto did not squarely deny D'Amico's credible testimony (sec. II,C, above) that Composto was present when Seaman told D'Amico about Seaman's grievance and that D'Amico subsequently consulted Composto on the subject.

⁴² Williams credibly testified that when she filled in as employment director and had to fill a job within an hour, she would call the "first guy and the nearest address," and that an employee in New Jersey would not have time to fill such an emergency job in Manhattan. Similarly, D'Amico credibly testified that when he was employment director, under these circumstances he would try to find someone who lived in the area or had any transportation to the shop in question. D'Amico credibly testified to the belief that Composto was trying to inconvenience him, and to harass him by calling him at the last minute. D'Amico credibly testified that when contacted about the Zuckerman job, he believed that the job was going to last for more than 1 day (as it in fact did), and that Composto was deliberately withholding this information and had made the call so that he could tell the NLRB that he had offered D'Amico a job.

D'Amico and said that the job could be longer. Then, D'Amico telephoned the union delegate at Zuckerman, Pat Tracy, and asked how long the job was for. Tracy said that the job was "day by day," that the regular occupant of that job was out with the flu, and that he would be back by the following Monday, August 28. D'Amico then telephoned Composto that it was not worth it for D'Amico to take a job for just 2 or 3 days since he had been out of work so long. Composto said, "Okay". D'Amico testified that he had turned down the job because he had lost his medical benefits and needed 30 working days in order to regain them, he was afraid that he would miss out on a longer or even a permanent job if it was called in to the employment office while he was working on a temporary job at Zuckerman, and he believed that Composto was just trying to be able to show the NLRB that he offered D'Amico a job. Composto testified in February 1998 that he could not remember what led him in August 1995 to select D'Amico to call about the temporary Zuckerman vacancy; cf. supra fn. 42. After testifying that so far as he knew, D'Amico could run no press except a Harris press, Composto testified that he could not recall what press was involved in this Zuckerman RFH; as previously noted, it was a Heidelberg. So far as the record shows, the employment office's next referral of a pressman to Zuckerman was William Gegenheim, whom Zuckerman put to work on Tuesday, August 29 (GC Exh. 10 p. 47). The record fails to show his out-of-work date, or whether he was a first or a second pressman.

This conversation was Composto's last contact with D'Amico.

After Composto became ill about March 1996, Williams temporarily took over his duties as employment director. She testified, and an entry made by her on D'Amico's new-style employment card states, that she telephoned D'Amico's residence on March 14, 1996, about a job with Bengal Printing as a second pressman. A notation on the card ("Son/N/A") suggests that the call was taken by a son of D'Amico;⁴³ D'Amico credibly testified that he never received this message.

On July 1, 1996, Scotto succeeded Composto as employment director. Meanwhile, in June 1996, D'Amico became ill, and he was unable to work thereafter. However, until late April 1997, Scotto made various telephone calls to D'Amico's residence with respect to job openings. More specifically, Scotto telephoned D'Amico twice on August 26 and once on November 11, 1996, with respect to jobs with employer Moffa, but nobody answered the telephone. On January 9, 1997, Scotto telephoned D'Amico about a permanent job with employer Union Hill, but D'Amico said to give it to somebody else. On March 31, 1997, Scotto telephoned D'Amico about a job with employer Pictorial, but he was not referred thereto, for reasons not shown by the record.⁴⁴ On April 15, 1997, he was contacted about a job with Arkay but said that he was not interested because the job was too far away. On April 16, 1997, he was called about jobs

with employers Pictorial and Scott but "Didn't answer back." On April 22, 1997, when called about a job with Pictorial, D'Amico said that "he is not feeling well, he is going to [the doctor's] and he cannot take jobs". An entry on D'Amico's employment card states, "July 1st 1997/Status [illegible]/Pension as of/December 1996," followed by an illegible signature.

L. Web-Press Referrals

On a number of occasions between March 22 and August 16, 1995, the employment office, without contacting D'Amico, referred employees with out-of-work dates later than D'Amico's to jobs as second pressmen on web presses. Concededly, D'Amico could operate sheet-fed presses only. The significance of the evidence as to web presses is discussed below at section II,M,3,b.

M. Analysis and Conclusions

1. Whether Composto and Scotto were agents of Respondent Union

The complaint alleges, and the General Counsel's brief argues, that employment directors Composto and Scotto were agents of Respondent Union. These allegations are denied in Respondent's answer.

I agree with the General Counsel that employment directors Composto and Scotto were agents of the Union. Composto and Scotto performed their duties pursuant to collective-bargaining agreements, to which the Union was a party, requiring the employer to advise "the Union office" of vacancies, and describing employees referred pursuant to this provision as having been "sent by the Union office." Also, the employment directors, all of whom were union members, participated in carrying out the provisions in the Union's rules which expect members to obtain jobs through "the Local office," and forbid them to obtain employment themselves "without the consent of the proper Local officer." Both Composto and Scotto, as well as D'Amico, testified that they had been given their position as employment director by the incumbent union president; union president LoPresti replaced Rotoli with Composto upon assuming the office of Respondent's president; and Composto testified that LoPresti told him that LoPresti had "talked it over with his other officers and they felt that [Composto] would be very good for the job. [LoPresti] felt that [Composto] would be an asset to the Union."⁴⁵ Composto initially testified, as an ad-

⁴³ At that time, his youngest son was 15 years old.

⁴⁴ As to the January 9 and March 31 telephone calls, Scott's notations on D'Amico's employment card state "witnessed by Anthony Caifano @ 12:20 p.m." and "witnessed by Joe Curto @ 3:30 p.m.," respectively.

⁴⁵ Rotoli, the employment director who immediately preceded Composto, testified that Rotoli's name had been brought up by then Union President Brady, and that Rotoli had been selected from a couple of other candidates by the MLA and the union representative at the ALA Industry Employment Fund. (D'Amico gave honest testimony that Rotoli got his job as employment director through Brady.) However, when union counsel asked Rotoli on cross-examination whether he was "unhappy with the LoPresti administration for terminating" him as employment director, Rotoli replied "I didn't like it, but as an employer, that's his right." Moreover, Union Vice President Curto, a trustee of the ALA employment fund, testified that "I believe" Rotoli was fired by the union president; and testified, in effect, that Rotoli was fired by a union officer or officers. Curto further testified that he did not know why Composto was appointed employment director.

verse witness for the General Counsel, that in the beginning of 1995, “I went to work for the Union as the employment officer;” although he later testified, as a witness for the Union, that he was “also employed by the MLA, half of my salary is paid by them” (see fn. 4, below). Similarly, Rotoli described the LoPresti administration as his “employer”. When MacNaughton superintendent Rickett, whose employer is an MLA member, was asked where D’Amico went after he left MacNaughton’s employ, Rickett described D’Amico’s acceptance of the employment director’s job as “Down to the Union”. Rickett went on to testify that when he wanted to hire D’Amico after Composto became employment director, Rickett told foreman Tyrrell to “call the Union” to request D’Amico’s referral. Tyrrell testified that when he hired press employees, he called “the Union hall” or “the Union;” that in hiring such employees he had never used any source other than Local One; that he had called Local One about hiring D’Amico, and that Composto was the person he called at Local One. Tyrrell further testified that MacNaughton’s discussions with the employment office about referring D’Amico were discussions “with the Union”. During the hearing, union counsel asked former employment director Rotoli, “How did you come to leave the employment of Local One?” to which Rotoli replied, without disclaiming union counsel’s identification of Rotoli’s employer, “I think that we didn’t get along with the new administration.” Similarly, when union counsel asked Composto, “Why wouldn’t the Local send a pressman to do an operator’s job?” Composto gave testimony about the operation of the employment office without disclaiming union counsel’s identification of who operated it. Further, in asking MacNaughton superintendent Rickett about his hiring practices and about his efforts to obtain a referral for D’Amico from the employment office, union counsel referred to the employment office as “Local One.” Moreover, after discussing with Composto on August 18, 1995, a temporary job opening with Terwilliger, D’Amico told the Terwilliger delegate that “the Union” had offered him a job with Terwilliger. When Composto and his predecessors were temporarily unable to perform their duties as employment director, this job was performed by Williams, a clerical employee on the Union’s payroll.⁴⁶ While on the Union’s payroll, Williams worked as assistant to the employment director between 1978 and at least the February 1998 hearing. For a 20-year period which extended beyond 1985, while serving as the secretary to employment directors Bernstein and then D’Amico and while sometime performing the employment director’s duties, Volpe was also on the Union’s payroll. When an employment director has a question regarding the operation of the employment office, he looks to officers of the Union, primarily the president, for direction. Although the expenses of running the employment office are paid by the ALA Industry Employment Fund, which is a legal entity separate from the Union and is controlled by a

⁴⁶ However, she is not a member of Respondent Union. Rather, as an employee on Respondent Union’s payroll, she is a member of and represented by what she testimonially described as “Local 153, the Whitecollars Union.” The identity of Local 153’s parent organization, if any, is not shown by the record.

board of trustees appointed by the industry and the Union,⁴⁷ and although the Employment Fund is the employment director’s formal employer, the trustees, the MLA, and representatives of the covered employers are never consulted regarding the operations of the employment office.

The foregoing evidence leads me to conclude that Composto and Scotto were the Union’s agents. *Longshoremen ILA Local 1426 (Wilmington Shipping Co.)*, 294 NLRB 1152, 1154–1155, 1157 (1989); *Fruin-Colnon Corp.*, 227 NLRB 59 (1976), enf’d. 571 F.2d 1017 (8th Cir. 1978). Although Respondent’s post-hearing brief does not in terms address the agency issue, that brief does state that the employment director “was in an appointed position and could be terminated consistent with the provisions of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 et. seq.” (p. 12 fn. 8), relying on *Finnegan v. Leu*, 456 U.S. 431 (1982).⁴⁸ Respondent’s reliance on this case supports the General Counsel’s agency contention, for that case upheld the right of an elected union leader to discharge appointed employees of the union, to substitute therefor a staff whose views are compatible with his own, and to select his own administrators as an integral part of ensuring a union administration’s responsiveness to the mandate of the union election.

2. Whether the employment office operates an exclusive hiring hall

It is convenient to address at this point the General Counsel’s contention, disputed by Respondent, that the employment office operated an exclusive hiring hall. The at least alleged significance of this issue is discussed section II,M,3,a-b, below.

I agree with the Union that the written collective-bargaining agreements do not call for an exclusive hiring hall. Although the bargaining agreements require the employer to notify the “Union office and the Shop Delegate” when the employer needs employees, the written agreements do not obligate the “Union office” or the “Shop Delegate” to refer any employees, nor do they impose any obligation on the employer with respect to the hire of employees referred by the employment office.

However, the General Counsel further contends that the employment office is an exclusive hiring hall by reason of the practice thereunder. As to whether such practices create an exclusive hiring hall which (under existing Board decisions) gives rise to the duty of fair representation, the Board has found that such a duty exists where the hiring hall constitutes “the normal and customary hiring and referral sources” for employees covered by the bargaining agreement. *Iron Workers Local Union 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998). I conclude that the record so shows. It is undisputed that the covered employers usually obtain press employees through the employment office. Thus, D’Amico (the employment director between 1985 and the end of 1992), Rotoli (the employment director in 1993 and 1994), Composto (the employment director between January 1995 and March 1997), and Curto (the Union’s executive vice president since the beginning of 1995)

⁴⁷ From Composto’s testimony that the MLA pays half his salary, I infer that the MLA pays half the cost of administering the ALA Employment Fund.

⁴⁸ During the hearing, Respondent’s counsel cited this case and suggested an argument similar to that advanced in Respondent’s brief.

all credibly testified to the opinion that covered employers were obligated to advise the employment office about vacancies, and not to hire from the street unless the employment office had failed to refer employees after a reasonable time. Similar testimony was given in February 1998 by Henry Kick, a member of the Union since 1952, who had been an operator on the press until 1982, had served as a shop delegate, and had been a union vice president between 1983 and his retirement in 1995. Furthermore, the Union's internal rules require members to seek employment only through the Union, and the bargaining agreements require union membership as a condition of continued employment.

The exceptions relied on by the Union are insufficient to render the parties' practice a nonexclusive hiring hall within the meaning of the Board cases which disclaim as to such nonexclusive referral arrangements the existence of a duty of fair representation. As to one such exception, with the Union's knowledge and without the Union's protest, covered employer MacNaughton had retained the existing work force of shops newly acquired by MacNaughton; on no other occasion has MacNaughton ever hired nonsupervisory unit employees who were not referred by the employment office. In addition, covered employers have hired off the street when the employment service, after request, had failed to refer employees whom the employer deemed to be qualified.⁴⁹

Curto—who as a union member worked in the trade for 37 years before becoming union vice president in 1995—testified in February 1998 that he knew of only one instance where a covered employer had hired from the street, and that employer had done so (long before 1994) because “the Union” had been unable to supply him with web pressmen on 5 previous occasions. Composto testified to one occasion when he was employment director where a covered employer (Bengal) had hired one prep-department employee from the street for a category the employment office had people for. Such exceptions to the normal and customary practice of hiring through the employment office have been held insufficient to render the hiring hall nonexclusive for purposes at least allegedly relevant here. See *California Iron*, supra, 326 NLRB at 387⁵⁰

Board precedent leaves me uncertain as to whether, at least to the extent that a bargaining relationship covered by a contract (even though that contract is identical to the contract covering other employers) is directed to a single-employer unit, a hiring-hall practice sufficient to create an exclusive hiring hall could be shown as to a particular em-

ployer by evidence that this particular employer always hires through the hall. Compare *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 779 fn. 8, 780 (1984), with *Development Consultants, Inc.*, 300 NLRB 479, 479–480, 494–496 (1990), and *Local 898, Laborers Local 898 (Anthony Ferrante & Sons)*, 251 NLRB 1579, 1580–1582 (1980).⁵¹ In any event, laying to one side MLA member MacNaughton's hire of employees who had been employed by newly acquired shops, it cannot be determined from the instant record whether the MLA's members included the employers specifically identified as having hired off the street (Pictorial, Crestwood, Bengal, Vanguard Litho, Master Eagle, IIC, and Pace).

3. Whether any conduct in connection with D'Amico's use of the employment office violated the Act

a. *The relevance vel non of whether the hiring hall was exclusive in nature*

It is well settled, and Respondent appears to concede (Br. p. 28), that whether a union-operated hiring hall is exclusive or nonexclusive, the union violates Section 8(b)(1)(A) by refusing to refer a member (like D'Amico) in retaliation for his participation in activity protected by Section 7 of the Act, including running for union office.⁵² In addition, the Board has long held that where a union operates an exclusive hiring hall, the union violates Section 8(b)(1)(A) and (2) by denying referral without regard to objective or established referral procedures.⁵³ However, at least since 1980, the Board has been taking the position that the latter restriction is not imposed on a union which operates a nonexclusive hiring hall. *Ferrante*, supra, 251 NLRB 1579 (1980), in light of *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990); see also, the cases cited at footnote 56, below.

In 1989, the Supreme Court found that a Federal District Court had jurisdiction to entertain suit by a union member, covered by a collective-bargaining agreement, who alleged that the defendant contracting union of which he was a member had violated its duty of fair representation by failing to refer him (arbitrarily and/or in bad faith and/or without reason or cause) under a contractually established referral system which the Supreme Court found to be nonexclusive. *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67. Rejecting the District Court's finding that this claim was preempted by the National

⁴⁹ Composto credibly testified, in effect, to having inferred that on occasion an employer's repeated refusal to hire employees referred by the employment office, or an employer's failure to request press employees until a time when the employment office was unable to supply employees, was motivated by a desire to hire off the street. Although the employment office may have complained to such employers about their conduct, the Union had never filed a grievance about it. On the other hand, as the General Counsel pointed out at the hearing, such alleged devious conduct by the employers would suggest that they felt an obligation to hire through the employment office.

⁵⁰ Of the at least 45 covered employers, only about 9 were identified in the record as ever having hired from sources other than the employment office.

⁵¹ *Bechtel* cites *Ferrante* in another connection (see 271 NLRB at 780). *Development Consultants* cites *Bechtel* in another connection (300 NLRB at 480).

⁵² See, e.g., *Operating Engineers Local 137 (Various Employers)*, 317 NLRB 909 (1995); *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 (1995), enfd. 16 F.3d 404 (3d Cir. 1993); *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100, 1101, 1111 (1986); *Plasterers Local 121*, 264 NLRB 192 (1982); *Electrical Workers IBEW (Albany Electrical)*, 327 NLRB 730, (1999).

⁵³ See, e.g., *Albany Electrical*, supra, 327 NLRB 730; *California Iron Workers*, supra, 326 NLRB 375; *Plumbers Local 519 (Sam Bloom Plumbing)*, 306 NLRB 810 (1992); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983); see also *Longshoremen Local 1969 (Shore Services)*, 328 NLRB 806 (1999).

Labor Relations Act, the Supreme Court stated, in part (493 U.S. at 73–89, emphasis in original):

We have long recognized that a labor organization has a statutory duty of fair representation under the [Act] “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) . . .

We decline to create an exception to the *Vaca* rule [holding that the NLRA does not preempt judicial jurisdiction over lawsuits alleging breach of the duty of fair representation] for fair representation complaints arising out of the operation of union hiring halls. Although the Board has had numerous opportunities to apply the NLRA to hiring hall policies, we reject the notion that the NLRB ought to possess exclusive jurisdiction over fair representation complaints in the hiring hall context . . . the cases cited by respondent [union do not] focus . . . on whether unions have administered properly out-of-work lists as required by their duty of fair representation . . .

The duty of fair representation . . . is an essential means of enforcing fully the important principle that “no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers” [citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971)]

Only because of its status as a Board-certified bargaining representative⁵⁴ and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because the members of the bargaining unit have entrusted the union with the task of representing them. . . . The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation. “The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation.” *Humphrey v. Moore*, 375 U.S. 335, 342 . . . (1964) . . . a union does not shed its duty of fair representation merely because it is allocating job openings among competing applicants.

In view of the foregoing language in *Breiner* and *Breiner*’s express finding (493 U.S. at 71) that the hiring hall involved in that case was not an exclusive hiring hall. I am unable to read *Breiner* in any way other than a holding that the duty of fair representation extends to a nonexclusive hiring hall, as the Respondent contends is involved in the case at bar.

⁵⁴ So far as the record shows, no such certifications have issued in the case at bar. However, for purposes relevant here, the same legal effect flows from the contractual provisions which recognize the Union as the exclusive collective-bargaining representative for all the lithographic employees. See *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786, (1996).

Nonetheless, about 9 months after the *Breiner* opinion, and without citing it, the Board stated in *Superior Asphalt*, supra, 300 NLRB 441, a case where the respondent union was the employees’ statutory representative under either Section 9(a) or Section 8(f):

A union’s duty of fair representation derives from its status as the exclusive bargaining representative of employees in a specified unit. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Where a union has a nonexclusive referral arrangement with an employer, the union has no exclusive status relating to potential employees. Individuals can obtain employment either through the union’s hiring hall or through direct application to the employer. Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist. Accordingly, no duty of fair representation attaches to a union’s operation of a nonexclusive hiring hall. See *Laborers Local 898 (Anthony Ferrante & Sons)*, 251 NLRB 1579 (1980).⁵⁵

Still without mentioning *Breiner*, the Board has adhered to the *Superior Asphalt*’s rationale and holding in subsequent decisions.⁵⁶

Breiner left undetermined the question of whether a union’s breach of the duty of fair representation with respect to a nonexclusive hiring hall constituted an unfair labor practice⁵⁷. However, to the extent that Board precedent may conflict with Supreme Court precedent, I am, of course, required to follow the Supreme Court. Accordingly, *Breiner* constrains me to conclude that at least where (at here) the hiring hall is operated by an exclusive statutory representative, the sole rationale tendered by the Board for the *Superior Asphalt* line of cases must be disregarded. To be sure, as *Breiner* pointed out, a breach of the duty of fair representation does not necessarily constitute an unfair labor practice. However, the combined weight of *Breiner*, non-*Superior-Asphalt* case law, and other consid-

⁵⁵ However, both the January 1989 brief amicus of the United States in support of the *Breiner* plaintiff’s petition for certiorari (pages 10–11 fn. 8) (signed by, inter alia, the Board’s then General Counsel), and the April 1989 brief amicus of the United States in support of the *Breiner* plaintiff-petitioner (pp. 14–15) (signed by, inter alia, the Board’s then Acting General Counsel), stated that the Board had not “yet ruled directly” on whether the duty of fair representation extends to a nonexclusive referral system, citing *Bricklayers’ Local 8*, 235 NLRB 1001, 1007 (1978); *Carpenters Local 1016 (Bertram Construction)*, 272 NLRB 539 (1984); and *Carpenters Local 608*, 279 NLRB 747 (1984), enf. 811 F.2d 149 (2d Cir. 1987), cert. denied 490 U.S. 1035 (1987). Neither brief refers to *Ferrante*.

⁵⁶ *Development Consultants*, supra, 300 NLRB 479 (1998); *California Iron*, supra, 326 NLRB 375; see also *Strawbridge & Clothier*, supra, 318 NLRB 500 (where, however, unlike here, the union was not shown to be a statutory exclusive representative); *Carpenters Local 537 (E.I. Dupont)*, 303 NLRB 419, 420 (1991) (which, however, unlike here and in *Breiner*, did not involve an exclusive bargaining relationship with the union which operated the hiring hall; see 303 NLRB at 421 fn. 5).

⁵⁷ Or, for that matter, with respect to an exclusive hiring hall; see *Breiner*, supra, 493 U.S. at 75 fn. 3.

erations discussed below leads me to conclude that breach of the duty of fair representation in the administration of a nonexclusive hiring hall violates Section 8(b)(1)(A) and (2) of the Act.⁵⁸

As previously noted, the Board takes the position that a statutory representative's arbitrary administration of an exclusive hiring hall constitutes an unfair labor practice. Because there is no apparent reason why the standards governing the duty of fair representation with respect to hiring halls operated by an exclusive statutory representative would significantly differ between nonexclusive and exclusive hiring halls,⁵⁹ extension of Section 8(b) of the Act to encompass the arbitrary administration of nonexclusive hiring halls would not be conceptually difficult. Moreover, in many and perhaps most cases, the statutory representative's control over an employee's *de facto* ability to get a job is comparable whether the hiring hall is exclusive or nonexclusive. For example, in the instant case, where each of at least 45 employers over a 4-State area is contractually bound to advise the Union office of any vacancies, as compared to a referred employee an individual and unassisted employee is obviously at an enormous disadvantage in finding appropriate vacancies before they are filled by employees referred through the employment office. Moreover, because the Union's internal rules forbid members to solicit or obtain employment for themselves without the Union's consent, as to members the Union's control over their job opportunities remains unaffected by the exclusivity or nonexclusivity of the hiring hall. I note, moreover, that all of the relevant contracts include union-shop clauses.

Furthermore, once *Breining* established that a statutory representative's arbitrary administration of a nonexclusive hiring hall is unlawful, a determination that such conduct constitutes an unfair labor practice under Section 8 has significant practical advantages. Such a conclusion would enable an employee allegedly aggrieved by the administration of a hiring hall to obtain in a single forum any relief which he was entitled

to receive from the union, without the need to litigate (perhaps in two different forums) what may be the close question of whether the hiring hall was nonexclusive (in which event, he would have to proceed in court unless he could prove that his nonreferral was due to his exercise of Section 7 rights) or exclusive. Furthermore, as shown by the instant case, as to whether particular referral conduct (1) was motivated by the employee's Section 7 activity although not necessarily arbitrary on its face, (2) was motivated by considerations or classifications which are irrelevant, invidious, or unfair (but not related to Section 7 activity), or (3) was without any discernible reason at all, the evidence will almost certainly overlap to a significant degree, and as a matter of efficiency should be presentable in only one forum.

For the foregoing reasons, and on the basis of *Breining*, I conclude that a union which is the Section 9(a) representative violates Section 8(b)(1)(A) and (2) of the Act by administering a hiring hall (nonexclusive as well as exclusive) in derogation of the duty of fair representation.⁶⁰

b. Whether Respondent acted in derogation of its duty of fair representation in connection with its early 1995 change in its standards in connection with referral

As found above, in early 1995 Respondent altered the standards used to determine whether the pressroom employee with the earliest out-of-work date would be contacted to determine whether to refer him. Prior to 1995, the employment director would telephone the employee with the earliest out-of-work date whose employment card stated on its face that the employee fell within the classification specified by the employer (e.g., second pressman) and that the employee was capable of operating the press in question. Although the employment director might choose to discuss the demands of the vacant job with an employee whose capabilities the director had some doubts about, the employee would nonetheless be referred to the job if he represented that he was in fact able to do the job and stated that he wanted to be referred to it. However, except when the employment office was being operated by Williams, if after 1994 the employment director believed that the em-

⁵⁸ In response to my request on the record (disregarded by the General Counsel), that the parties discuss *Breining* in their post-hearing briefs, Respondent Union's brief avers that *Breining* "merely states that a union may breach its duty of fair representation if it discriminates against a member in hiring hall referrals" (emphasis added). Because *Breining* relied (493 U.S. at 73, 89) upon a case which expressly found a duty of fair representation as to nonmembers (*Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); see also 493 U.S. at 73-78, 87-88), I doubt that *Breining* is so limited. In any event, such a distinction would be irrelevant as to whether the Union acted lawfully as to D'Amico, because he has been a member of the Union at all relevant times. My independent research has not disclosed any post-*Superior Asphalt* case where the Board has tendered any explanation for the result reached in the *Superior Asphalt* line of cases (namely, that a statutory representative's arbitrary administration of a nonexclusive hiring hall does not constitute an unfair labor practice) other than the rationale disapproved by *Breining*. Nor has Respondent tendered any alternative underpinning for *Superior Asphalt*.

⁵⁹ Thus, in *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), the Board applied to the duty of fair representation in a statutory representative's operation of an exclusive hiring hall the same standards which *Breining* used in defining that duty with respect to a nonexclusive hiring hall.

⁶⁰ I am aware that *Breining* is couched in terms of a contractually established hiring hall. However, *Breining* was dealing with the construction industry, where the existence of a contract may render a statutory representative under Sec. 8(f) a union which is not a statutory representative under Sec. 9(a). Because in the instant case the employers' contractual relations with the Respondent Union rendered it an exclusive 9(a) representative not only during the effective period of the contract but presumptively thereafter (*Auciello*, supra, 517 U.S. at 786), during this period the employers were lawfully bound to deal with no other as to mandatory subjects of collective bargaining. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944). Because it is this exclusive representative status which underlies the duty of fair representation (*Vaca v. Sipes*, 386 U.S. 171, 176-177 (1967)), and because a hiring hall is at least to some extent a mandatory subject of collective bargaining (*Star Tribune*, 295 NLRB 543, 545-546 (1989); cf. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952)), I conclude that the duty of fair representation as to hiring halls extends to a 9(a) representative without regard to the existence of a current contract. See *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976); *Breining*, supra, 493 U.S. at 88.

ployee with the earliest out-of-work date in the appropriate classification was unable to operate the press in question or would not be acceptable to the employer, the employee would not be contacted at all about that vacancy even though his employment card claimed that he could in fact operate that press.

The Board has held that when the bargaining representative changes the rules governing its operation of an exclusive hiring hall, it must make a good-faith effort to give timely notice of the rule change in a manner reasonably calculated to reach all of the employees who use the exclusive hiring hall. *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996). Because this requirement derives from the bargaining representative's duty of fair representation,⁶¹ for the reasons stated above, section II,M,3,a I conclude that this requirement extends to nonexclusive hiring halls as well. In the instant case, there is no evidence that the employees who were users of the hiring hall were ever given any notice of this change, and D'Amico credibly testified, in effect, that he was unaware of it;⁶² indeed, Respondent's witness Curto, a pressman who had been a member of the Union for 41 years and had been its vice president of organizing since the beginning of 1995, testified in February 1998 that the only qualifications that the employment officer is supposed to use in making referrals is the information from the employee himself. Although implementation of such changes is itself unlawful only where notice of the change would make it possible for registrants to protect themselves from adverse consequences of the change (see *Bloom*, supra, 306 NLRB 810 fn. 1), if in the instant case D'Amico had received such notice as soon as Composto changed the referral standards, D'Amico could have apprised the employment office of the full extent of his abilities as a second pressman as he perceived them (see "The Remedy" below) and would have had an opportunity to try to dispel any doubts which Composto might have expressed.⁶³

In any event, the standards for referral newly adopted by employment director Composto, following his 1995 displacement of former employment director Rotoli pursuant to the action of newly elected union president LoPresti (according to union counsel, in order to effectuate the change in union administration), are invalid because such standards are not objective in character. *Plumbers Local 32 (Alaska Pipeline)*, 312 NLRB 1137, 1138-1139 (1993), enf. 50 F.3d 29 (D.C. Cir.

1995), cert. denied 516 U.S. 974 (1995). Composto testified that he would make referrals based on qualification information not on the employment card, if he had reason to believe something else other than what was on the card; he testified that he did not know whether his predecessors as employment director followed this practice, and that there was no particular time when he decided to base his decision on information not on the card, "I just guess it was a common sense thing. I just did it when it happened . . . I don't think there is any date that all of sudden I said I am going to start doing this."⁶⁴ Such a subjective basis for deciding whom to contact about job vacancies renders this case unlike *Morrison-Knudsen Co.*, 291 NLRB 250 (1988), relied on by Respondent, where the referrals were objectively considered in that a written record was made of each individual's qualifications stated by the individual in conjunction with the business agent's assessment based on questions he had asked the individual and with the referral records, which indicated whether the employees had previously performed the particular kind of work in question (see *Alaska Pipeline*, supra, 312 NLRB at 1138). In the instant case, Composto did not systematically attempt to question each employee about his qualifications. For example, although Composto testimonially sought to explain at least some of his failures to contact D'Amico about certain vacancies on the ground that D'Amico was not qualified to fill them, Composto further testified that other than the entries on D'Amico's original employment card, when allegedly copying it in about early April 1995 Composto did not know what presses D'Amico could operate; that as of July 21, 1995, "I only knew he ran a Harris;" that D'Amico "probably" could not operate a web press (a kind of job as to which D'Amico was never contacted, although it is undisputed that no such limitation was entered onto his employment card until mid-August 1995); and that Composto referred him to a job on a Komori (allegedly by mistake, see above, sec. II,J) although "I don't believe he had any experience on a Komori". Indeed, because more than 1200 employees used the employment office, and the bargaining agreements set forth about 21 different job classifications⁶⁵ and about 56 different kind of presses, it is difficult to see how the employment director would be able to operate the employment office with regard to objective criteria, or established referral procedures, without keeping systematic written records as to which presses each press employee was capable of operating, and whether he would operate as to each such kind of press as a first or a second pressman; and without systematically making written records of the classifications, and kinds of presses, which were the subject of employer requests for help. However, the documents in the record show that the employment director kept no such records in a systematic manner. Although the referral system did revert to the pre-1995 standards when Williams performed the duties of the employment director between about March 1996 and Scotto's appointment to that position on July

⁶¹ *Ford, Bacon & Davis*, supra, 262 NLRB at 51, 701 F.2d at 510.

⁶² Thus, Scotto, who in July 1996 succeeded Composto as employment director, testified that when a pressman told Scotto to put the pressman down for presses which Scotto did not believe the pressman could operate, Scotto did not alert the pressman to the fact that Scotto would not refer him for jobs on such presses.

⁶³ I am aware of the evidence that this change of policy was initiated more than 6 months before D'Amico filed his charge. However, the very gravamen of the Union's breach of its duty of fair representation is its failure to notify the users of the hiring hall about the change, and the 6-month limitations period set forth in Sec. 10(b) does not begin to run until the party filing the charge knew or should have known about the unlawful conduct. See, e.g. *SAS Electrical Services*, 323 NLRB 1239, 1253 (1997), and cases cited. In any event, by failing to urge a Section 10(b) defense before me Respondent has effectively waived any such contention. *Public Service Co. of Colorado*, 312 NLRB 459, 461 (1993); *Helnick Corp.*, 301 NLRB 128 (1991).

⁶⁴ Similarly, Composto testified that if an employee said he was a first pressman, this would be noted on the employee's card, and Composto would refer him as such "unless I knew better."

⁶⁵ This figure treats all operators as one classification and all pressmen as one classification.

1, 1996 (indeed, Williams was virtually compelled to do so because “I am not a pressman. I only took what [the pressman] told me”), certain portions of Scotto’s testimony indicate that he, like Composto, exercised an impermissible degree of discretion in operating the employment service. Thus, he testified at one point that he did not accept the qualifications statement on the employee’s employment card, because “most of the time” the employee is not telling the truth; rather, Scotto testified, he consulted Respondent’s computer records to ascertain where the employee had worked, would thereby determine what presses he had run, and then would decide for himself what work the employee could do. Moreover, he testified, he would not tell the employee what limitations Scotto had placed on where the employee would be referred.⁶⁶

In view of the foregoing, I find that as to determining whether an employee’s abilities qualified him to be contacted for the job in question and to be referred thereto if he so desired, the duty of fair representation required the Union to operate the employment office, at all times relevant here, without any material changes (other than those discussed below in connection with Incident 50) in the rules and standards used up to the end of 1994.

In considering whether Respondent violated Section 8(b)(1)(A) and (2) by virtue of breach of the duty of fair representation in connection with particular vacancies, I have determined that an RFH for a pressman which did not specify a first pressman should have led to the referral of a second pressman (D’Amico’s classification); this determination is based on the testimony of Rotoli and Composto that this was their practice. I also conclude that as to this branch of the case, and because D’Amico was never contacted with respect to any of the jobs listed infra, the General Counsel has made out a sufficient prima facie case as to a particular vacancy on a sheet-fed press if, but only if, he has shown the referral to a sheet-fed press job of a second pressman with a later out-of-work date than D’Amico’s, or the referral of a first pressman to a sheet-fed job where the employer had either requested a second pressman, or failed to specify that he wanted a first pressman. However, such a showing is sufficient to establish an unfair labor practice unless the Respondent can establish a justification related to the efficient operation of the employment service. *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992); *Albany Electrical*, supra, 327 NLRB 730, *Ironworkers Local 843 (Norglass, Inc.)*, 327 NLRB 29 (1998). I conclude that the Union has established such a justification upon a showing that the referred employee was requested by name. *Morrison-Knudsen*, supra, 291 NLRB 250.⁶⁷ In finding that Respondent acted unlawfully as to the vacancies discussed under this heading (sec. II,M,3,b), I make no finding as to whether, if contacted,

D’Amico would have asked to be referred to any or all such vacancies, whether the employer would have hired him, or whether he could have performed the work in question. The gravamen of the Union’s unlawful conduct is that he was not contacted in order to enable him to decide whether he wanted to be referred to the job.

In view of my finding (below at sec. II,M,3,c) that Composto was motivated by D’Amico’s unsuccessful candidacy for union office in preparing for D’Amico a new-style employment card which limited to Harris presses the statement on D’Amico’s old-style card that he was capable of acting as a second pressman on all presses, I conclude that D’Amico’s rights under the referral system after the preparation of this new-style card and until Composto amended it on August 17, 1995, in accordance with D’Amico’s representations about what presses he could operate, are to be evaluated on the basis of D’Amico’s claims on the original card. Accordingly, I find that Respondent acted in derogation of the duty of fair representation, and, therefore, violated Section 8(b)(1)(A) and (2) of the Act, by failing to contact D’Amico as to second pressman jobs on about the following dates as to the following employers:

About April 4, 1995, as to employer Barton Press, for a job filled by employee Cannizzaro (Incident 35).

About April 11, 1995, as to employer Litho Art, for the job filled by employee Vacca (Incident 36).

About April 25, 1995, as to employer Gerson (Incident 38).

About April 21, 1995, as to employer Crestwood Printing (Incident 40).

About April 12 and/or 25, 1995, as to employer Rapoport (Incident 42).

About May 31, 1995, as to employer Zuckerman (Incident 48). An RFH for a second pressman was filled by an employee who, although he had an earlier out-of-work date than D’Amico’s, was a first pressman on the press in question.

About May 30 and June 5, 1995, as to employer Atwater, for a job filled by employee Vacca (Incident 49).

About June 23, 1995, as to employer Atwater (Incident 50). Although Composto explained this referral of Vacca as a call-back, it was a call-back to the job for which Vacca had been referred and hired after the Union unlawfully failed to contact D’Amico about it (Incident 49). In any event, I regard the “call-back” exception to the normal referral system as invalidly discretionary, in view of Composto’s testimony that there is no “bench mark” as to how long an employee may be off the RFH employer’s payroll while retaining “call-back” referral rights with respect to that employer; indeed, D’Amico testified that “call-back” status might last as long as 6 months. Moreover, D’Amico’s credible testimony shows that Composto’s “call-back” practice departed from that previously observed. Thus, D’Amico credibly testified that when he served as employment director, once an employee obtained a new out-of-work date it was not a common occurrence for the employment office to refer that employee back to his most recent employer; D’Amico explained that this referral practice discouraged employers from effecting

⁶⁶ However, immediately thereafter, he testified that the employment director had no authority to determine whether a pressman could operate a given press if the pressman said that he could operate it.

⁶⁷ Even where a particular employee has been requested by name, at least ordinarily the employment office will not refer him out of order unless a union officer has approved the referral. The employment office’s right to refer an employee out of order if requested by name does not, of course, privilege the Union to grant or deny such requests for arbitrary or discriminatory reasons.

very short layoffs. Moreover, he credibly testified that at least ordinarily, he would not have referred such an employee to his most recent employer, unless D'Amico had nobody else to refer.

About June 26 and 27, 1995, as to employer TFH for the job filled by Robert Hopkins (Incident 51).

About June 26, 1995, as to employer D&L (Incident 54). The RFH does not specify a first pressman, and although the employee who was hired (Traina) was able to work as a first pressman on the press specified in the RFH, there is no evidence that he was referred as such, he also worked as a second pressman, and there is no evidence that he would not accept a second-pressman's job on the press in question.

About July 5, 1995, as to employer Barton Press (Incident 58).

About June 30, 1995, as to the job filled by employee Bilancione with employer Terwilliger (Incident 59).

About July 6, 1995, as to employer Herst Litho (Incident 60).

About July 17, 1995, as to employer Scott Press (Incident 64).

About July 24, 1995, as to employer Bengal (Incident 67).

About July 31, 1995, as to employer Terwilliger (Incident 68).

About July 31, 1995, as to employer Pace Press (Incident 69).

About July 31, 1995, as to employer Scott, with respect to the job filled by Bilancione (Incident 70).

About August 7, 1995, as to employer Terwilliger, with respect to the job filled by Louis Chiacchiaro (Incident 72).

About August 7, 1995, as to employer Sanford Graphics (Incident 73).

About August 7, 1995, as to employer Scott (Incident 74).

About August 8, 1995, as to employer Scott, with respect to the job filled by Hopkins (Incident 75).

As previously noted, on a number of occasions between March 22, 1995, and August 16, 1995, the employment office, without contacting D'Amico, referred employees with out-of-work dates later than D'Amico's to jobs as second pressmen on web presses. Although some of the RFH's for these jobs specified or may have specified web presses, and D'Amico was unable to operate web presses, his employment card did not contain until August 17, 1995, any lawfully inserted limitation to this effect, and although Composto testified that D'Amico "probably" could not operate web presses, Composto's knowledge as to what D'Amico could do was very limited (see *supra* fn. 16, 35). Accordingly, I find that the Union further violated Section 8(b)(1)(A) and (2) by failing to contact D'Amico about these vacancies. However, because D'Amico could not operate web presses, if contacted as to web press jobs he almost certainly would have advised the employment office that for this reason he did not want to be referred to them; and in the highly

unlikely event that he did receive a referral, it is even more unlikely that he would have been hired.

c. Whether Respondent discriminated against D'Amico, in the operation of its employment office, because of D'Amico's Section 7 activity

As Respondent does not dispute, Respondent would violate Section 8(b)(1)(A) of the Act by operating its employment office (whether exclusive or nonexclusive) so as to discriminate against D'Amico because of his Section 7 protected activity in running for union office against a prevailing rival who had run as a member of a group of prevailing candidates who included LoPresti and Curto; see cases cited above *fn.* 52. I agree with the General Counsel that Respondent engaged in such conduct.

Thus, the record shows that in the fall of 1994, D'Amico's unsuccessful campaign for union office was opposed by a group including LoPresti, who was elected to the office of union president. Composto owed his job as employment director to LoPresti, who hired him while he was "quite sick" in the hospital and who was determined to appoint someone in order to displace the incumbent employment director appointed by LoPresti's defeated predecessor Brady—namely, Rotoli, who had unsuccessfully run against another candidate (Calderone) in the LoPresti group. Moreover, Curto (another successful candidate in the LoPresti group) participated in Composto's refusal to grant employer MacNaughton's urgent request for the issuance of a referral slip to D'Amico.

Furthermore, D'Amico's unsuccessful candidacy against a member of the group which included LoPresti, the newly elected union president to whom Composto owed his job as employment director, is the only explanation even suggested by the record for Composto's otherwise gratuitous action in preparing for D'Amico a new employment card with a "branch" entry which severely limited the kind of jobs claimed by the "branch" entry on the employment card prepared by former employment director Rotoli in late 1994; more specifically, the card prepared by Rotoli in D'Amico's presence claimed second pressman jobs on all presses, while the card as originally prepared by Composto without D'Amico's knowledge claimed second pressman jobs on Harris presses only. However, Curto credibly testified that if a pressman were limited only to second pressman jobs on manual Harris presses, there would be a very limited number of jobs which he could be referred to. Any suggestion that this significant change was due to mere negligence by Composto is dispelled by his testimony that during his tenure as employment director, as to pressmen he had not had enough time to prepare a new-style card to substitute for every old-style card, and, in consequence, he did not normally prepare a new-style card to replace an old-style card until the occurrence of a triggering event consisting of a contact with respect to a job. Because D'Amico had not been contacted for a job at any time between his December 1994 deposit of his original, old-style employment card and Composto's preparation of a new-style D'Amico employment card in early April 1995, Composto's preparation of that card could not have been motivated by the triggering event of a job contact. Moreover, the record contains a number of old-style employment cards for other pressmen with referral-date notations which establish that

such triggering notations had not caused Composto to prepare a new-style card and put the old one into dead files (see GC Exh. 8).

D'Amico's candidacy is likewise the only plausible explanation in the record for Composto's and Curto's action in refusing MacNaughton's express request, and D'Amico's at least implied request, that D'Amico be referred to MacNaughton. MacNaughton eventually took the position that it wanted to hire D'Amico to work as an operator on a large, manually operated Harris press; that it would pay him pressman's rate for that work because it wanted to have on hand someone who (like D'Amico) would be able to operate that press as a pressman; and that it would not hire anyone but D'Amico to fill the operator's vacancy. On previous occasions, the employment office had asked MacNaughton to accept an employee referred to a job in a lower category than his "book" specified. Moreover, less than 2 weeks after Composto and Curto rejected MacNaughton's request that D'Amico be referred as an operator at pressman's pay, with Curto's approval the employment office referred an employee (Purdy) who had been requested by name in employer Pace's RFH for a second pressman but whom Pace hired as an operator (above at sec. II,J, Incident 77). Moreover, on other occasions the employment office had referred employee Ruggiero when he was requested by name because of his skills on unusual presses (above at sec. II,D). Rather similarly, Composto testified that on occasion, he had referred employees out of order in response to requests for "somebody for a specialty" (above at sec. II,J). Furthermore, the Union's officers had on other occasions honored employers' requests that named employees be referred, and so far as the record shows, such requests had previously been refused only where other employees were available for referral to the vacant jobs. Nevertheless, Respondent defends its refusal to refer D'Amico on the ground that such a referral would have been unfair to the operators, and also to the pressmen with earlier out-of-work dates than D'Amico's. However, because Rickett credibly testified that it is difficult to obtain any employees with experience on the large, manually operated sheet-fed Harris press; because Composto did not fill out an RFH form, which would have specified the press for which a pressroom employee was wanted; and because Respondent has never claimed that the employment list at that time included any operators or pressmen who had worked on such a press, I infer that there were none.⁶⁸ While it is true that both union and employer witnesses testified that the employment office's inability to refer a qualified employee would permit the employer to hire from the street, because of the Union's internal rules union member D'Amico could not obtain a job in this manner without the Union's permission. Accordingly, Composto's and Curto's conduct had the effect of withholding a job from D'Amico for

which nobody else referred by the employment office would be accepted, and even though from time to time the employment office would refer an employee requested by name, sometimes because of his unusual abilities on unusual presses, notwithstanding the availability of other registrants with earlier out-of-work dates.

Also, D'Amico's unsuccessful candidacy is the only plausible explanation in the record for Composto's failure to contact D'Amico even consistently with D'Amico's new-style employment card as initially written by Composto—namely, a claim that D'Amico could operate Harris presses. Thus, the employment office responded to Terwilliger's June 30, 1995, request for a second pressman on a Harris by referring a second pressman (Bilancione), with a later out-of-work date than D'Amico's, without contacting D'Amico (above at sec. II, Incident 59).⁶⁹ Nor is there any other plausible record explanation for Composto's action in failing to contact D'Amico before referring second pressman Vacca, whose employment card states that he is able to operate a Heidelberg but says nothing about a Harris, in response to an RFH requesting a second pressman who could operate both a Heidelberg and a Harris press (above at sec. II,J, Incident 73). D'Amico's out-of-work date was earlier than Vacca's, even D'Amico's new-style employment card as originally written by Composto claimed ability to operate the Harris press not claimed by Vacca, D'Amico's original employment card claimed ability to operate all presses, and he had made such an oral representation to Composto about two weeks earlier.⁷⁰ Finally, in attempting to explain the referral of second pressman Hopkins to Scott without first contacting D'Amico, notwithstanding D'Amico's earlier out-of-work date, Composto relied on an event (Scott's rejection of a first pressman who had been referred to the press in question) which occurred after Hopkins had been referred (above at sec. II,J, Incident 76).

For the foregoing reasons, I find that the employment office's failure to contact D'Amico about the jobs as to which a Section 8(b)(1)(A) and (2) violation has already been found, and its refusal to refer him to MacNaughton, were motivated at least in part by his Section 7 activity in running for union office; and I do not credit Composto's testimony otherwise. In so finding, I attach no significance to unsuccessful candidate Kick's testimony that the new union administration always

⁶⁸ Respondent's brief asserts (pp. 27, 32) that if pressman D'Amico had been referred to MacNaughton, the employees in the operator classification "would have been justified in filing their own unfair labor practice charges." Such a contention is difficult to square with any contention that because Respondent allegedly did not operate an exclusive hiring hall, the complaint would be sustainable only on a showing that discrimination in administration of the employment service was based upon D'Amico's exercise of his Sec. 7 rights.

⁶⁹ Rather similarly, although Composto admitted that D'Amico's original employment card claimed ability to operate a Harris, and although Composto did not refer first pressmen in response to requests for second pressmen unless no second pressmen was available, before receiving the new-style employment card blanks from the printer the employment office, without contacting D'Amico, referred a first pressman in response to a February 1995 request from Gerson for a second pressman on a Harris (see above at sec. II,F, Incident 14). However, the complaint does not allege that the Union violated the Act in February 1995.

⁷⁰ Indeed, even accepting Composto's discredited testimony that D'Amico's original card claimed Harris presses only, and further accepting Composto's oral representation to D'Amico on August 17 that Composto had forgotten D'Amico's July 21 representation that he should be called as to all sheet-fed presses, no legitimate reason appears for Composto's action in referring Vacca, who claimed Heidelbergs but made no such claim as to Harrises.

treated him with the respect he deserved, in view of his retirement upon the completion of his term of office at the end of 1994. Nor do I attach any significance to the absence of evidence that the employment office discriminated against unsuccessful candidate Rotoli after he was replaced by Composto as employment director, since thereafter Rotoli had no contact with the new administration and left the trade. Nor am I persuaded to conclude otherwise as to D'Amico by Composto's testimony that "a couple of times" during the 15-month period when he performed the duties of employment director, he called for jobs "people who had been on different slates." I find that such vague testimony regarding a "couple of times" during a period when Composto was receiving more than 80 requests merely for pressmen or second pressmen affords little weight to any contention that Composto bore no animus toward D'Amico's candidacy. Because such candidacy partly motivated the Union's conduct, the Union thereby violated Section 8(b)(1)(A) and (2) unless it can show that for lawful reasons, it would have taken the same action with respect to D'Amico. *Pacific Maritime Assn.*, 308 NLRB 39, 46 (1992); *Operating Engineers Local 137 (Various Employers)*, supra, 317 NLRB at 911, 924; *Local 121, Plasterer Local 121*, supra, 264 NLRB 192. However, the Union's "call-back" claim as to some of these actions is insufficient because it relies upon an unlawful explanation (see discussion above at sec. II, M, 3, b under Incident 50, Atwater). Nor has the Union met its burden with respect to the MacNaughton incident, in view of the evidence that the alleged rights of operators and other pressmen were a pretext for not referring D'Amico. As to the Union's other actions, the record contains no evidence of lawful reasons. Accordingly, I find that such failures to contact D'Amico, and the refusal to refer him to MacNaughton, violated Section 8(b)(1)(A) and (2) of the Act.

Appropriate for discussion at this point are other incidents on which the General Counsel also relies in alleging that the Union acted with an unlawful motive. Thus, the General Counsel relies on the August 22–23 Zuckerman incident, apparently because this job (as a substitute for a sick employee, and initially described by Zuckerman as a one-day job) was in Manhattan whereas a few days earlier New Jersey resident D'Amico had expressed interest to Composto in jobs in New Jersey, and because on August 22 D'Amico was not made aware of the job until an hour when there was a substantial possibility that if he accepted it, he would report late for the shift. I disagree with the General Counsel that these circumstances call for the inference that Composto acted in bad faith in connection with the Zuckerman job, particularly because on the following day Composto offered D'Amico the same job with the statement that it would probably last two or three days because the ailing employee had the flu. I note, however, that although Composto testified that so far as he knew, D'Amico could run only a Harris, Zuckerman's RFH involved a Heidelberg.

Nor do I base my unlawful-motive inference on the August 21 Terwilliger incident (above at sec. II, J). The General Counsel relies mostly on the fact that acceptance of this job would have required D'Amico to work with Seaman, who during the 1994 election campaign had distributed fliers in front of the union hall in support of electioneering against D'Amico be-

cause of his handling of Seaman's grievance. However, there is no substantial evidence contradicting Composto's testimony that when contacting D'Amico about the job, Composto did not know that Seaman was working at Terwilliger.⁷¹ Although Composto's conduct in connection with this incident is peculiar in several respects, I do not think that such peculiarities warrant the inference that Composto made the contact in bad faith.⁷²

As to the General Counsel's contention of unlawful motive, he does not seem to rely at all on the peculiarities of the July 21 Terwilliger incident (above at sec. II, H). More specifically, an RFH from Terwilliger dated Friday, July 21 (the date which Composto testimonially attached to his message from Terwilliger via LoPresti) asked for a first pressman, a second pressman, and an operator; and an operator and a pressman were put to work by Terwilliger the day after Composto told D'Amico on Monday, July 24, that both pressman's jobs were with D&L Litho, had started on Monday, and had already been given away. In view of the General Counsel's failure to press the matter, I shall not pursue it further.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Board has jurisdiction over this proceeding by virtue of the existence of a collective-bargaining agreement between the Union and an association of employers who operate in four States and who are collectively engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union has violated Section 8(b)(1)(A) and (2) of the Act, between about April 4, 1995, and about August 8, 1995, by failing to contact and refer Richard E. D'Amico for work through the employment office.

4. The Union has violated Section 8(b)(1)(A) and (2) of the Act, about late July 1995, by refusing to refer Richard E. D'Amico to MacNaughton Einson Graphics.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

⁷¹ However, an RFH dated July 26, 1995, on behalf of Terwilliger was made to the employment office by "Jim Seaman" (GC Exh. 9, p. 65). Nor does Seaman's name appear on the subsequent employment transaction lists which are in the record.

⁷² These peculiarities are as follows: Although the press involved was a Komori, and although this incident occurred after the alleged date when Composto changed D'Amico's new-style employment card so as to claim jobs on presses in addition to Harris presses, Composto inaccurately told D'Amico that the job was on a Harris press. Also, although Composto told D'Amico on July 24 that Composto's July 21 message had involved a job with D&L Litho, and this was the only job about which Composto had contacted D'Amico in July, Composto told D'Amico on August 21 that the Terwilliger job about which Composto had contacted D'Amico that day was the same job about which he had been contacted the previous month. Further, Composto testified that he did not know about Seaman's electioneering against D'Amico, although it had played a part in the campaign in which Composto was an (unopposed) candidate; and Composto's notation on D'Amico's employment card inaccurately attributes his rejection of the Terwilliger job partly to the "heavy board" on the Komori. However, the General Counsel does not seem to make much of these peculiarities, and I do not believe they preponderantly show bad faith.

REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, as to job vacancies in units as to which the Union is the exclusive statutory representative, Respondent will be required to operate its employment office in accordance with objective rules or standards of that office, and to change such rules or standards only after having given notice of such changes to the employees who use that office. In addition, Respondent will be required to make D'Amico whole for any losses he may have suffered by reason of Respondent's unlawful failure to contact him about vacancies and Respondent's refusal to refer him to MacNaughton, in the manner prescribed in *F W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1957). Because D'Amico became disabled in June 1996, no further action will be required as to him.

In addition, Respondent will be required to post appropriate notices. Because the employment office is used by nonmembers, because the employment office is physically visited by its users only when picking up work slips (sometimes not even then) and registering for future referral, and because the geographic scattering of members' residences suggests that many of them may not regularly attend meetings at the union hall, Respondent will be required to mail copies of the notice to all employees who have been registered at the employment office since April 4, 1995 (the date on which Respondent's unfair labor practices began), and to send copies to each employer to whom the employment office's services have been available at any time since April 4, 1995, for posting, such employer willing.

During this litigation, as to employers other than MacNaughton, Respondent has strenuously urged that D'Amico's abilities were very limited, and has also contended that D'Amico was not seriously seeking referral. As pointed out above, any such limitations or reluctance are not material to whether the Union committed unfair labor practices against him with respect to the employment office, because the Union's unlawful failure to contact him with respect to vacancies which came within the scope of his employment card (without the limitations gratuitously and discriminatorily inserted thereon by Composto) deprived him of the opportunity, to which the pre-1995 employment-office rules and practices entitled him, to make the ultimate determination about whether he wanted to be referred to the job. At this point in the proceeding, except as to MacNaughton it cannot be determined when (if ever) he would have requested such referral, whether the employer would have offered to hire him if he had been referred, or whether he would have accepted such an offer; such issues will have to be resolved on compliance. However, it may be appropriate to observe that the Union may well be underestimating D'Amico's abilities, and his appeal to prospective employers, as a second pressman.

Thus, D'Amico was unquestionably experienced on the large manually operated sheet-fed Harris presses, very few employees had such experience, and at least one covered shop besides

MacNaughton uses this kind of press. Moreover, certain kinds of essential skills have been acquired by all journeymen pressmen (like D'Amico) regardless of the kind of press or presses they have actually worked on (see particularly, Union Vice President Curto's testimony on pp. 899-902 and 888-890 of the transcript). Curto, an

experienced first pressman, testimonially compared the difference between a 40-inch, 4-color Miehle and a 40-inch, 4-color Komori to the difference between driving a car with an automatic shift and a car with a stick shift. Composto testified that if he referred a pressman to work on a kind of press on which he had no experience, the employer usually would not hire him, or would lay him off after one day, and would be unwilling to train him. However, as previously noted, Composto frequently failed to specify on the RFH form the kind of press involved. Moreover, when in August 1995 Composto referred D'Amico (allegedly by mistake) to a job with Terwilliger on a Komori press, on which D'Amico had no experience, and D'Amico told Terwilliger foreman Scaglione (among other things) that D'Amico was not wholly familiar with the Komori, Scaglione's request that D'Amico not take the Komori job was based on the potential "hassle" between D'Amico and incumbent Komori operator Seaman, rather than on D'Amico's admitted unfamiliarity with the Komori, and Scaglione said that "if something comes in on any other press . . . by all means come and take the job". In connection with the addition of a console (a kind of computer) which had been introduced and become common while D'Amico was acting as employment director or as union vice president, Curto testified that the only difference between a kind of press which is manually operated and the same kind which is console-operated is that the console assists in making adjustments which on a manually operated press are all made by hand. Curto further testified that the computer made the job easier physically, although more difficult mentally, "You had to change your way of thinking from a mechanical way to the computer." Curto, at least, learned from a fellow pressman how to operate the computer on a particular press, although as to another kind of computerized press he went to a school conducted by the manufacturer of that press—a service frequently made available by press manufacturers. He testified that his experience on another kind of press would assist him in learning how to operate a Heidelberg, and that speed and the way in which adjustments are made are the only differences between the older presses and those with computer consoles, although it would take him "weeks" to come up to speed on a computerized Heidelberg. MacNaughton plant superintendent Rickett credibly testified that although it would typically take some weeks of training to teach a manual pressman how to operate a console, it would typically take him less time to learn to operate the console than somebody who had no manual experience at all. Although Rickett went on to testify that sometimes an excellent manual pressman gets afraid of the computers and "can't press the button," it cannot be presumed that this would be D'Amico's reaction, particularly because he had used computers on a daily basis while working as employment director. The Composto-headed employment office's own discounting of the significance of a console is shown by its July 1995 referral of second pressman Wayne Wink, with a later

out-of-work date than D'Amico's and whose employment card states that he can operate a Heidelberg without a console, in response to an RFH requesting a first pressman on a 4-color Heidelberg with console (above at sec. II,G,b, Incident 67). D'Amico credibly testified to the opinion that because presses had become more computer-oriented and more technical while he was serving as employment director, he would have had to receive some training before he could hold a position as second pressman on a press other than a Harris press. He further credibly testified, however, that even though such changes had also taken place on Harris presses, in his opinion the console-operated Harris presses are easier to operate than the manual Harris presses on which he had worked before becoming employment director. Also, he credibly testified that after he became a pressman, 35 percent of his time had been spent on presses other than the large, manually operated Harris press. Finally, he testified that before becoming employment director, he had in fact operated some Miehle presses. Although Respondent's counsel asks me to discredit this testimony about Miehle operations on the ground that D'Amico's prehearing affidavit states merely that he had operated Harris presses (a matter which I have taken into account in assessing D'Amico's credibility generally),⁷³ the factual issue thus presented is immaterial in the present proceeding, and can be resolved on compliance if it becomes relevant thereto.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁴

ORDER

Respondent Local One, Amalgamated Lithographers of America, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause discrimination against Richard E. D'Amico by refusing to refer him to work with MacNaughton Einson Graphics, or by failing to contact him and refer him to work through the employment office, or by otherwise causing or attempting to cause discrimination against him, in retaliation for his activities protected by Section 7 of the Act.

(b) Failing or refusing to refer Richard E. D'Amico, in accordance with objective, consistent criteria and standards, through the employment office to employment in bargaining units as to which the Union is the exclusive statutory representative.

(c) In any like or related manner restraining or coercing employees, its members, or applicants for employment in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and operate the employment office in a manner which does not discriminate against applicants for employment

because of their exercise of rights guaranteed them by Section 7 of the Act.

(b) Use objective, consistent criteria and standards in referring applicants for referral through the employment office to jobs in units of which Respondent is the exclusive statutory representative.

(c) Adequately notify the users of the employment office of any changes in these criteria and standards.

(d) In the manner specified in that part of this Decision captioned "The Remedy," make Richard E. D'Amico whole for any losses he may have suffered by reason of Respondent's unfair labor practices.

(e) Preserve and, on request, make available to the Board, for examination and copying, all employment transaction lists, employment checkoff lists, requests for help, employment cards, work slips, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(f) Within 14 days after service by the Region, post at its business offices and meeting halls, and in the employment office, copies of the attached notice marked "Appendix."⁷⁵ Copies of the notice, on forms provided by the Regional Director for Region 22, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members and/or employees are customarily placed. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent shall also mail a copy to each employee who is or has been registered with the employment office since April 4, 1995; and to each employer to whom the employment office's services have been available at any time since April 4, 1995, for posting, such employer willing, at that employer's place of business.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 1999.

APPENDIX

NOTICE TO EMPLOYEES, APPLICANTS FOR EMPLOYMENT, AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

⁷³ Rickett testified that D'Amico had worked "on the larger equipment" the whole time he was with MacNaughton.

⁷⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board

⁷⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT cause or attempt to cause discrimination against Richard E. D'Amico by refusing to refer him to work with MacNaughton Einson Graphics, or by failing to contact him and refer him to work through the employment office, or by otherwise causing or attempting to cause discrimination against him, in retaliation for his activities protected by Section 7 of the Act.

WE WILL NOT fail or refuse to refer Richard E. D'Amico, in accordance with objective, consistent criteria and standards, through the employment office to jobs in bargaining units represented by us.

WE WILL NOT in any like or related manner restrain or coerce employees, applicants for employment, or members in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL maintain and operate the employment office in a manner which does not discriminate against applicants for employment because of their exercise of rights guaranteed them by Section 7 of the Act.

WE WILL use objective, consistent criteria and standards in referring applicants for referral through the employment office to jobs in bargaining units represented by us.

WE WILL adequately notify the users of the employment office of any changes in these criteria and standards.

WE WILL make Richard E. D'Amico whole, with interest, for any losses he may have suffered by reason of our unfair labor practices. Because of disability, he is now unable to work in the trade.

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF
AMERICA